COMMERCIAL LAW

MACMILLAN AND CO, LIMITED
LONDON BOMBAY CALCUTTA MADRAS
MELBOURNE

THE MACMILLAN COMPANY
NEW YORK BOSTON CHICAGO
DALLAS SAN FRANCISCO

THE MACMILLAN CO OF CANADA, LTD
TORONTO

COMMERCIAL LAW

AN ELEMENTARY TEXT-BOOK FOR COMMERCIAL CLASSES

BY

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THIRD EDITION

BY

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ASSISTANT READER IN COMMON LAW TO THE COUNCIL OF LEGAL EDUCATION

MACMILLAN AND CO, LIMITED
ST MARTIN'S STREET, LONDON
1920

First Edition 1893 *Reprinted* 1899
Second Edition 1903, 1906, 1908, 1910, 1912
Third Edition 1914
Reprinted 1917, 1919, 1920

EDITOR'S PREFACE

HAVING been asked by the publishers to prepare for the press a third edition of Professor Munro's primer, I have taken the opportunity of rewriting the chapter on Charter-parties and Bills of Lading, which appeared to want a good deal of revision, and I have added a short chapter on legal proceedings and arbitration

I have also written a chapter on Companies, consisting partly of new matter and partly of the paragraphs on this topic which were formerly contained in the chapter on Mercantile Persons and Mercantile Property The chapters on Partnership and on Principal and Agent have been revised and now appear in Part I instead of Part III The whole of the text has been carefully revised, and effect has been given to the legislation passed, and decisions of the Courts given, since 1903, the date of the last revision

I may repeat the caution to the reader with which I concluded the preface of the last edition

A book of this size is not an encyclopædia. It cannot possibly contain more than an outline of the various branches of law with which it deals To many of the propositions laid down there are qualifications and exceptions, the inclusion of which would only tend

to confusion, but of which a knowledge may be necessary in some commercial transactions. Let not a young merchant pride himself on being a pundit in Commercial Law because he has mastered an elementary treatise, lest his pride have a fall, and he make personal acquaintance with the law of Bankruptcy

J. G. PLASE

TEMPLE,
May 1914.

IMPRESSION OF 1917

THIS is a verbal reprint of the Third Edition, but additional notes (1) on Section 107, *Where the Object is Unlawful*, and (2) Section 230, *Deviation and Excepted Perils*, will be found at pp. 187-188

J. G P

March 1917

EXTRACT FROM PREFACE TO FIRST EDITION

THE object of this little book is to provide an elementary text-book on Commercial Law for schools and colleges Lectures on Commercial Law are now given every winter in many of our large towns These lectures attract bankers, accountants, and young business men The want of a text-book has long been felt, as the existing works are too advanced for practical use In writing this work I have aimed at brevity and simplicity of statement As a rule cases are not quoted, but many of the illustrations embodied in the text are taken from decided cases At the end of each chapter or part, reference is made to the leading text-books, to which the reader is referred for further information

J E C MUNRO

2 NEW SQUARE,
LINCOLN'S INN

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PART I

MERCANTILE PERSONS AND MERCANTILE PROPERTY

CHAPTER I

INTRODUCTORY

§ 1 **Mercantile Persons** — Commercial transactions are carried on by individuals or sole traders, partnerships and companies, and by their agents

§ 2. **Sole Traders** —No distinction is now drawn between subjects and aliens as regards capacity to trade, except that an alien cannot own a British ship If an alien purchase a British ship, the ship thereupon ceases to possess a British character During war a subject cannot trade with the enemy except by license of the Crown

Married women were formerly under trading disabilities, inasmuch as they could not own property or bind themselves by contract except in the City of London But since 1882 these disabilities have been removed, and a married woman can hold as her separate property money and property belonging to her at the time of her marriage or acquired subsequently (including money and other property acquired by her in any trade carried on by her separately from her husband), and can enter into contracts so as to render herself liable in respect of and to the extent of her separate property (§§ 76-80)

Persons under twenty-one may lawfully trade, but are not liable to be sued upon their trading contracts (§§ 70-75)

The executors and administrators of a deceased trader are liable to see to the payment of his debts out of his assets, and may be concerned in carrying on his business An executor is a person appointed as such by a will An administrator is a person appointed by the Court where a man has died without making a will, or where he has made a will and has appointed no one as executor. The term personal representatives or legal personal representatives is often used to mean executors or administrators.

§ 3. **Partnerships.**—Partnership is the relation which exists between persons carrying on a business in common with a view to profit. Persons who enter into partnership with one another are called a firm In Scotland the "firm" is legally a distinct person from the members, but this rule does not prevail in England, though English law recognises the firm for certain purposes The relations of partners to one another will be considered in a subsequent chapter, but it may be here pointed out that each member of a partnership is an agent of the firm and of the other partners for the purposes of the business of the partnership Third parties therefore in dealing with a member of a firm are dealing at the same time with the other members

§ 4. **Companies.**—A company may be defined as a number of persons incorporated by law, so that the company has a distinct personality apart from the persons who compose it. An unincorporated company is merely a partnership, and has no legal existence apart from its members, contracts are entered into with the partners as individuals, and every member is liable for the debts of the partnership In the case of an incorporated company, contracts are entered into with the company itself and therefore creditors can only proceed against the property of the company (As to the incorporation and management of Companies see further *post*, Chap III)

§ 5. **Kinds of Property.**—Most mercantile transactions relate to property of some kind Lawyers divide property

into two kinds called real property and personal property Real property comprises all estates in land, *i e.* interests in land greater than leases for terms of years Thus the interest of a tenant in fee simple, or of a tenant for life in freehold or copyhold land, is real property, but the interest of a tenant for a term of years, however long, even a term for 99 or 1000 years, is personal property, so also is the interest of a tenant from year to year, or a weekly tenant

§ 6. **Real Property.** — Mercantile transactions are mostly concerned with personal property, but real property is often acquired for business premises and for mining and other operations The law of real property is more complicated than that of personal property, and cannot be adequately dealt with in this work. It differs in many respects from the law of personal property Land includes things growing on or affixed to it (such as trees, crops, and houses) and everything below it (such as mines and minerals)

§ 7 **Personal Property.** — Personal property is of two kinds, called chattels real, *i e* those interests in land which are personal property as above described, and pure personalty

Pure personalty again is of two kinds (1) goods and chattels or choses in possession, and (2) rights or choses in action Mercantile law is largely concerned with both these kinds of pure personalty

Goods and chattels comprise all physical objects except land capable of being the subject of property, such as a horse, a bale of cotton, money, or corn

§ 8. **Ships** —Ships also are personal property, but differ in some respects from other chattels A ship, in order to be entitled to the name and privileges of a British ship, must be owned by a British subject, or a body corporate (such as a company) established under and subject to the law of some part of His Majesty's dominions, and having its principal place of business in those dominions Every British ship must be registered as such, unless she is exempt from registration. Among others, ships not exceeding 15 tons employed solely in navigation of the rivers or coasts of the United Kingdom, or of some British possession

within which the managing owners are resident, are exempt from registration The property in a British ship is regarded as divided into 64 equal parts, and any number of owners up to 64 may hold one or more sixty-fourths each, and be registered as the owners of such shares Or any number of persons not exceeding five may be registered as joint owners of a ship or of any sixty-fourth share or shares of a ship A corporation may be registered as owner by its corporate name A ship or any share in a ship is transferred by a bill of sale, and upon the production of such bill of sale in the proper form and duly executed the name of the new owner is entered in the register

§ 9. Choses in Action.—Choses, or things, in action comprise those kinds of property which consist merely in rights or claims Their nature can be best illustrated by examples If A possesses ten sovereigns, the sovereigns are chattels capable of physical possession, if B owes A. ten sovereigns, A cannot be said to possess those sovereigns, but he possesses a right of action against B, and this right is property So too a share in a railway company or £100 consols are not physical property, but are only rights in the one case to a share in the dividends and assets of the company, in the other to an annuity of £2 · 10s from the Government

Property of this kind is liable to be confused with property capable of physical possession, because the right is often conferred by some physical object. Thus a bill of exchange is a piece of paper with certain writing and signatures on it But the piece of paper is strictly only evidence of the right, and is in itself of no value except in so far as its possession confers on the holder a right of action against the acceptor or some other party This right may be worth thousands of pounds, whilst the piece of paper on which it is written is of such infinitesimal value that it may be disregarded, and the right of action, *i e* the right to the money which the acceptor of the bill promises to pay to the holder, may exist even after the loss or destruction of the piece of paper. But in the case of a horse or a bale of cotton the only property is in the thing

itself, and if the horse or bale of cotton is destroyed there is no property left

We may now consider separately some of the chief forms of rights of action, viz shares, stock, debentures, debenture stock, copyright, patents, trademarks, and goodwill Others, such as bills of exchange and cheques, will be considered hereafter

§ 10. **Shares and Stock**.—The capital of a company subscribed by the shareholders consists of shares or stock The nature of this property is more fully described in a later portion of this work The holder of shares or stock has certain rights in the company, which may be transferred by transfer of his shares or stock. Debentures and debenture stock also are personal property, giving the holders certain claims against the company issuing them Their nature is described hereafter

§ 11. **Stock.**—The term "stock" is applied to denote either the amount of capital contributed to a company (see *post*, § 36) or the amount advanced to a government.

A portion of the national debt is called the funded debt, and the holder of stock in the funds has a right to a perpetual annuity, subject to the right of the Treasury to redeem such annuity by the payment of a stipulated sum For instance, £100 2½ per cent stock is the right to receive a perpetual annuity of £2 10s per annum, subject to the right of the Government to redeem such annuity by the payment of £100

The public funds consist of several kinds of stock, the nature and legal incidents of each kind being fixed by the Act of Parliament creating it The most important stock is known as consols

Stock in the public funds is transferred by signature in the books at the Bank of England The owner may attend personally to authorise the transfer, or he may appoint an agent for the purpose, by writing under his hand and seal attested by two witnesses In some cases stock may be represented by certificates payable to bearer, and then the stock can be transferred by delivery of the certificate.

§ 12. **Copyright.**—Copyright is the sole right to repro-

duce or perform any original literary, dramatic, musical, or artistic work The author is usually the first owner of the copyright, but he may assign it and, if he does so, the assignee has the rights of the author Copyright subsists for the life of the author and a period of fifty years after his death An action lies against any person who infringes the copyright in any work by publishing, reproducing, performing, translating, or dramatising it, or by selling or importing for sale any copies without the consent of the owner of the copyright, and in certain cases penalties may be recovered summarily

§ 13. **Designs.**—Any new or original design applicable to any article of manufacture or to any substance, whether it relate to the pattern, the shape, or the ornament thereof, may be registered at the proper office By such registration copyright is acquired in the design for five years from the date of registration, and such period may be extended for further periods of five years A design will not be registered where it has been previously published in the United Kingdom The design has to be registered for a particular class, or particular classes, of goods

§ 14. **Patents.**—By obtaining a grant of letters patent from the Crown, the true and first owner of an invention acquires the exclusive right of making, using, and selling it for a period of fourteen years The right so acquired is called a "patent" An applicant for a patent has to lodge at the patent office a specification describing that nature of the invention and the manner in which it is to be performed If the application is accepted the applicant gets a provisional protection which enables him to use the invention until the formal grant of letters patent is sealed The application may be refused on various grounds, and persons objecting to the grant may be heard in opposition The Crown in making the grant does not take upon itself to say whether the invention is new or not A patentee is therefore liable to find his patent invalid, because some one has previously patented or published the subject-matter. A record of all patents is kept at the patent office, and this record can always be searched The time for which a

patent is granted may be extended by the Judicial Committee of the Privy Council for a further term of seven, or, in exceptional cases, fourteen years, where the patentee has not received adequate remuneration And a patent may be revoked, or the patentee may be compelled to grant compulsory licenses, if the patentee makes default in adequately working it and supplying the patented article to the public on reasonable terms

§ 15 **Trademarks and Goodwill.**—A trademark is a mark applied to goods in order to denote their make or quality, or to indicate the firm who exported or manufactured them By registering a trademark the proprietor acquires the exclusive right of using it in connection with the goods in respect of which it is registered A trademark may consist of a name printed in a particular or special manner, the signature of the applicant, an invented word or word having no direct reference to the quality or character of the goods and not being a geographical name, or any other mark adapted to distinguish the goods of the proprietor from those of other persons

A trademark can only be assigned along with the goodwill of a business

§ 16. **Goodwill.**—A goodwill is nothing more than the expectation that the old customers of a firm will continue their dealings after the business has been transferred to a new firm The purchaser of a goodwill usually stipulates for his protection that the vendor will not carry on the same business in the neighbourhood The extent to which such stipulations are valid will be considered in a subsequent chapter (§ 112)

§ 17 **Authorities** —The treatises on Personal Property by Mr Williams and by Mr Goodeve are elementary works of high repute Reference may be also made to Mr. J. W Smith's *Compendium of Mercantile Law*, and *The Common Law of England*, by Dr. W Blake Odgers, K C, on the subject-matter of this and the following chapters There are many treatises specially dealing with companies, copyrights, patents, trademarks, and other subjects referred to in this chapter.

CHAPTER II

PARTNERSHIP

§ 18. **Its Nature** — Partnership has already been defined as the relation that subsists between persons carrying on a business with a view to profit The partners may make any agreement they please as to the amount of capital, labour, or skill that each one is to contribute to the business, but the sharing of the profits is absolutely essential to a partnership If an agreement, for instance, be made that one of the partners is to have no share in the profits, he is not a partner The mere receipt of a share of the profits will not of itself be conclusive as to the existence of a partnership The executors of a partner may, after his death, be entitled to a share of the profits, but the receipt of such share will not necessarily make the executors partners Sharing profits is, however, evidence of partnership, but it is not conclusive—all the facts of the case must be examined and the real intention of the parties ascertained A widow or child of a deceased partner may receive by way of annuity a portion of the profits without becoming thereby a partner Interest to a creditor may vary with the profits, or take the form of a share of the profits without the creditor becoming thereby a partner But parties are not permitted to exercise the powers of a partner and at the same time under the cover of some arrangement escape the liabilities of a partner A creditor who lends money in consideration of a share in the profits is obliged, in case the borrower becomes bankrupt, to

postpone his claims until all the other creditors are paid But if his debt is secured by any charge or mortgage, his rights under such charge or mortgage remain unaffected

§ 19. Power of a Partner to bind the Firm.—Every partner is an agent of the firm and of his other partners for the purposes of the partnership As between the partners and third parties, each partner is taken to have full authority without any express agreement to enter into contracts binding on himself and his co-partners, so long as such contracts relate to the usual and ordinary business of the partnership He may therefore sell any goods belonging to the firm, buy any goods required for the business, engage clerks, and receive all debts due The exact limits of a partner's authority naturally depend on the character of the business of the firm Where the firm is carrying on some trade, a partner, as a rule, has in addition to the above powers full authority to make and accept bills of exchange in the name of the firm He may also borrow money on the firm's credit, and for that purpose pledge any goods belonging to the firm

On the other hand, a partner is not an agent to bind the firm in matters not connected with the firm's business, unless he is specially authorised

A partner, for instance, has not authority to bind the firm by a document under seal An express authority from the firm for such a purpose is required, and such authority must be under seal Nor can a partner give a guarantee in the firm's name without special authority, unless it is the usage in the firm, or in other firms engaged in the like business, so to do Nor can a partner bind his firm by a submission to arbitration

The general authority of a partner to bind the firm may be restricted by agreement between the partners, but such agreement will not affect third parties unless they have notice of it If a third party, having notice of such agreement, enters into a contract with the partner outside his restricted authority, the firm is not bound by it In order to prevent any controversy arising as to the scope of the notice, care should be taken to warn third parties that the

firm will not be answerable for the acts of the partner outside of his limited authority

A partner who enters into an unauthorised contract may, however, be personally liable upon it

§ 20. Liability of Partners.—A partner is liable jointly with the other partners for all the debts and obligations of the firm incurred while he is a partner. A partner's liability begins when he enters the partnership; he is not liable for debts previously incurred. By retiring from the firm, and giving notice to that effect, he ceases to be liable for subsequent debts. But so long as he is a member of the firm, liability attaches to him jointly with his co-partners.

On the death of a partner the partnership is dissolved, and his estate then becomes severally liable to the payment of partnership debts in so far as they are unpaid, but subject to the prior payment of his own private debts. It follows from this rule that, on the death of a partner, the creditors of the firm can only obtain payment out of his estate after his private debts have been satisfied. But they can also claim against the surviving partners.

When loss or injury is caused to any person by any wrongful act or omission of a partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, the firm is liable to the same extent as the partner so acting or omitting to act.

§ 21. Liability of Persons "holding out."—If a man, by words or conduct, represents himself as a partner, or allows others to do so, he is liable as a partner to any one who, on the faith of such representation, gives credit to the firm. The mere use of a man's name without his knowledge will not make him liable as a partner, the use of the name must be with his assent. A retiring partner, in order to avoid liability, ought always to give public notice of his retirement.

The principle of "holding out" does not apply to the executors of a deceased partner who permit the old name to be continued in use.

§ 22. **Partnership Property.**—All property originally brought into the partnership-stock, or subsequently acquired for the purposes of the firm, is partnership property. Hence land or shares bought by one partner with the money of, and on account of, the firm, become the property of the firm, though the partner takes an assignment to himself

§ 23. **Rights and Duties of Partners.**—The rights and duties of the several partners one towards another may be agreed on and are usually incorporated in a written agreement or deed whereby the respective interests of the partners are determined. The Partnership Act 1890, however, lays down certain rules by which these rights and duties are to be determined where they are not provided for by agreement between the partners. The chief of these are as follows —

1. All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards all losses.
2. Every partner is entitled to be indemnified by the firm in respect of payments made and personal liabilities incurred in the ordinary business of the firm, or for the preservation of the property of the firm
3. A partner making for the purpose of the partnership any actual payment or advance beyond the amount of capital which he has agreed to subscribe is entitled to interest at the rate of 5 per cent.
4. A partner is not entitled before the ascertainment of profits to interest on the capital subscribed by him
5. Every partner is entitled to take part in the management of the partnership business

Where any difference occurs, it is to be decided by a majority of the partners, except that (1) where a change is to be made in the nature of the partnership business, the consent of all the existing partners is required; (2) a majority cannot expel a partner, and (3) a new partner cannot be introduced without the consent of all the existing partners.

6 No partner is entitled to remuneration for acting in the partnership business

7. Every partner is entitled to have access to and to inspect and copy the partnership-books, which are to be kept at the place where the business is carried on.

In all partnerships the partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representative.

A partner in the course of the partnership business must not make any undisclosed profit for himself.

Hence he must account for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection

A partner too, if he carries on a business of the same nature as the partnership, and competing with it, must hand over to the firm all the profit he makes, unless he has the consent of his co-partners to the carrying on of such competing business

§ 24. Dissolution of Partnership —Subject to any agreement between the partners, a partnership is dissolved—

1. If entered into for a single undertaking, by the termination of the undertaking.

2 If entered into for a fixed term, by the expiration of that term

3 If no fixed term has been agreed upon, by any partner giving notice to the other partners of his intention to dissolve the partnership. It is desirable that this notice be in writing.

4 By the death of a partner

5 By the bankruptcy of a partner.

A partnership may, notwithstanding any agreement of the parties, be dissolved—

1 By the happening of any event that renders the business of the firm illegal

2. By a decree of the court

The court will, as a rule, order a dissolution of partner-

ship where circumstances have arisen that render it just and equitable that the partnership should be dissolved, where one partner is found a lunatic after inquiry, where a partner becomes permanently incapable of carrying out his partnership agreement; where a partner has been guilty of conduct prejudicially affecting the carrying on of the business, or where the business can only be carried on at a loss

§ 25. **Effects of Dissolution.**—After a dissolution, the authority of each partner to bind the firm continues as far as may be necessary to wind up the affairs of the partnership, but not otherwise. The property of the firm must be realised and applied in the following order: in paying (1) the debts and liabilities of the firm; (2) any advances made by a partner; (3) what is due to the partners in respect of capital Any surplus left is to be divided equally amongst the partners

These rules are to be taken as subject to the terms of the partnership agreement

§ 26. **Limited Partnerships.**—By a recent Act of Parliament limited partnerships have been authorised A limited partner is a partner in a firm who contributes a certain amount of capital, and is not liable for the debts and liabilities of the firm beyond that amount But he may not take any part in the management of the business, and has no power to bind the firm Limited partnerships must be registered, and may be wound up like companies

§ 27. **Authorities.**—The greater portion of the law of partnership has been codified in the Partnership Act of 1890. Sir F Pollock's Digest of the Law of Partnership includes this Act. A larger treatise is the standard work of Lord Lindley. Strahan and Oldham's *Law of Partnership* is an excellent work for students.

CHAPTER III

COMPANIES

§ 28 When it is desired that a large number of persons should contribute capital to a business, and that their liability should be limited to the amount of the capital they have subscribed, a company with limited liability is formed for the purpose. It is unlawful for more than twenty persons to carry on business in partnership, whereas there is no limit to the number of persons who may be members of a company. When the members are incorporated into a company, the company is regarded as a person in law It can enter into contracts and sue and be sued, and can own property just as an individual can

§ 29 How Incorporation takes place.—A company may be incorporated (*a*) by royal charter; (*b*) by special Act of Parliament; (*c*) by a certificate issued under the Companies Acts

(*a*) The Crown in virtue of its prerogative may incorporate a number of persons as a company. The British South Africa Company, incorporated by Royal Charter in 1889, is a well-known example

(*b*) Many companies are incorporated by special Acts of Parliament Most of our Railway Companies have been incorporated in this way

(*c*) Since 1862 many trading companies have been incorporated under the Companies Acts, which enable any seven or more persons to obtain a certificate of incorporation by subscribing their name to a memorandum of association, stating the name of the proposed company, the objects for

which it is to be incorporated, and whether the liability of the members is to be limited or unlimited If certain conditions are complied with they can at once obtain a certificate of incorporation from the Registrar of Joint Stock Companies Other persons can then become members of the company by taking shares in it.

§ 30. **Limited and Unlimited Liability** —The liability of the members of a company may be unlimited, in which case there is no limit to the liability of the members for the debts of the company. Most companies registered under the Companies Acts are incorporated as "limited companies," and in such companies the liability of the members is limited to the amount unpaid (if any) on their shares Thus suppose a member of a limited company has 100 shares of £1 each in a limited company,—if the shares are fully paid up he cannot be made further liable; but if only five shillings has been paid in respect of each share, his liability continues to the extent of the remaining fifteen shillings, that is £75 in all In no case, however, can a creditor of a company sue a member of the company for a debt contracted by the company Creditors have to be content with taking proceedings against the company itself, and if the company cannot pay, proceedings, as we shall see later on, may be taken to wind up the company, and the law will compel every member to contribute that which is due from him in respect of his shares. In some companies the liability of the directors is unlimited, whilst that of the other members of the company is limited.

§ 31. **The Memorandum.**—The law requires the memorandum to contain the following particulars in the case of an "unlimited" company.—

1. The name of the company.
2. Whether the registered office will be situate in England, Scotland or Ireland
3. The objects for which the company is established.

If the company be "limited," the memorandum must also state—

4. That the liability of the members is limited.

5. The amount of share capital and its division into shares of a certain fixed amount.

The memorandum is the charter of the company, and defines and limits the powers of the company. The company cannot validly do anything not included in its objects as set forth in the memorandum The objects are usually declared in wide terms, and should include power to enter into contracts, to give receipts, accept and endorse bills, to invest moneys, to bring or defend actions, to refer disputes to arbitration, and indeed all powers which may be required for carrying on the business for which the company is formed The "objects" cannot be altered except with the sanction of the High Court.

§ 32. **The Articles of Association** —The original members may sign *Articles of Association* as well as a memorandum of association In the case of a limited company they need not do so, as the Companies Acts supply Articles of Association for companies which have none of their own.

The articles of association prescribe the rules to be observed in the administration of the company's affairs They usually relate to calls upon shares, the transfer and forfeiture of shares, the increase or reduction of capital, the borrowing of money, proceedings at meetings, the election, retirement and powers of directors, the auditing of accounts, the declaration of dividends, winding up, and the distribution of assets The articles of association can be altered by the company, by a special resolution of the shareholders in general meeting

§ 33 **Directors** —The articles usually declare that the management of the business shall be vested in the directors The shareholders are thus excluded from the management, though they necessarily exercise great control through their power of censuring or removing a director The directors cannot validly do any act not within the objects of the company as set out in the memorandum of association

§ 34 **General Meetings** —General meetings of the shareholders must be held at least once a year, and extraordinary general meetings are held when required* All

the shareholders usually have the right to attend and vote at general meetings At these meetings the directors are usually elected, dividends are voted, and other business of a kind for which the approval of the shareholders is required is carried out The only effective control which the shareholders can exercise over the company is by voting at these meetings Members who are not present in person can vote by proxy if the articles of association allow them to do so.

§ 35. **Shares.**—The capital of a limited company is always, as we have seen, divided into shares The persons who sign the memorandum and articles have to state opposite their names how many shares they take. Other shareholders obtain shares by applying for them. The directors may accept an application for shares by allotting shares to the applicant, and the posting of the notice of allotment to him makes him liable to take and pay for the shares The applicant is usually required to remit a portion of the amount of each share when he makes his application, and another portion when the shares are allotted to him. Subsequent payments are termed "calls," and the articles usually authorise the directors to make calls from time to time until the whole amount is paid Certificates may be issued by the directors certifying the number of shares held by a shareholder, and such certificate is *prima facie* evidence that the holder owns the shares

A person to whom a share has been allotted or who has taken a share by transfer from some other member is a shareholder, and his share gives him certain rights against the company He cannot call upon the company to pay him back the amount he has paid for his share, but he has a right to his proportion of any profits that may become distributable as dividends, and if the company is wound up he has a right to a share of the surplus assets. Shares can always be transferred subject to the company's regulations They are usually transferred by deed The shareholders' names are registered, and usually each shareholder is entitled to a certificate stating the number of shares he holds.

§ 36 Stock.—When the capital of a company is fully paid up it is often converted into *stock*. Stock differs from shares in that (1) it is always fully paid up, so that a stock holder never incurs any liability for the debts of the company, and (2) it can be transferred in fractional parts If the original shares are £10 shares an investor can only hold capital in multiples of that sum; but if the shares are converted into stock he can be a holder of stock amounting to, say, £15 or £17 or any odd sum.

§ 37. Debentures.—Companies often borrow money by issuing debentures or debenture stock A debenture is a document under the seal of a company given to secure the repayment of money advanced to the company, such repayment being usually secured by a charge on the whole or part of the property of the company A debenture may, however, be issued without any such charge The debenture holder looks to the property charged as the security for his money, and generally stipulates that he will be entitled to certain remedies in case the money is not repaid when due

A debenture holder is usually entitled to interest at a fixed rate before any of the profits of the company are distributed as dividends But a debenture holder is not as such a member of the company.

§ 38 Debenture Stock.—Debenture stock is a charge on the undertaking of the company prior to all shares or stock, and is entitled to interest before any dividends are paid But holders of debenture stock cannot require repayment of their capital A holder of debenture stock is, like a holder of debentures, a creditor, not a member, of the company

§ 39. Winding up.—A company may be wound up (1) by the Court, (2) voluntarily, (3) voluntarily but under the supervision of the Court

1. The High Court of Justice (or other Court having jurisdiction) will order a company to be wound up—

(*a*) When the company has passed a resolution resolving that the company be wound up by the Court.

(*b*) When the company does not commence business

within a year from its incorporation, or suspends business for a year

(*c*) Whenever the number of members is less than seven

(*d*) When the company is unable to pay its debts

(*e*) When the Court thinks that it is just and equitable that it should be wound up

2. A company may, without going to the Court, wind up its affairs voluntarily, but this will not prevent a creditor from asking the Court for a compulsory order Voluntary winding up is often resorted to where it is desired to reconstruct the company on a new basis. The company authorises the winding up by resolution, and appoints a liquidator for the purpose.

3. In some case where a voluntary winding up has been resolved upon, the Court may order the winding up to proceed under its supervision This course has the advantage that the assistance of the Court can be readily obtained when necessary.

When a company is wound up a liquidator is appointed. He collects and realises the assets of the company, including unpaid calls on shares, pays the creditors and the expenses of winding up, and distributes the surplus, if any, among the shareholders The procedure is analogous to that followed upon the bankruptcy of an individual.

§ 40. **Private Companies.**—Many family businesses are now registered as private companies, with limited liability. In the case of a private company no offer of shares is made to the public, and the right of transfer is often restricted A private company may consist of as few as two members, and cannot consist of more than fifty.

CHAPTER IV

PRINCIPAL AND AGENT

§ 41. **Introductory.**—An agent is a person employed to do an act on behalf of another The person for whom such act is done is called the principal. The division of labour has been carried to such an extent in connection with the distribution of goods, that sellers as well as buyers often find it to their advantage to effect sales and purchases through the agency of third parties

Any person who has capacity to enter into a contract may appoint an agent. any person may be appointed agent, even though he be a minor. An agent is usually remunerated by commission or salary, but no consideration or payment is necessary to create agency

§ 42 **Kinds of Agents.**—The chief classes of mercantile agents are factors, brokers, auctioneers, and *del credere* agents Solicitors and bankers also frequently act as agents in commercial transactions

A factor is an agent for sale to whom possession of the goods is given

A broker is an agent who negotiates contracts for the sale and purchase of property, and who is not ordinarily entrusted with its possession Brokers are also employed to negotiate insurances, arrange for the charter of ships, and other purposes There are several kinds of brokers A stock and share broker is an agent employed to sell or buy stocks or shares An insurance broker is an agent employed to effect a policy of insurance

An auctioneer is an agent employed to sell property by auction

A *del credere* agent is an agent for sale who gives an undertaking to his principal that the parties with whom he contracts will fulfil their engagements.

§ 43. **Appointment of Agents**—An agent may be appointed expressly by any form of words, except in certain cases, where a special form is required.[1] It is generally desirable to have the terms of the appointment reduced to writing, so as to avoid any subsequent dispute as to the extent of the agent's authority

§ 44. **Holding out**—A person may sometimes be made liable for the acts of another who is not his agent but whom he has by words or conduct represented to be such For instance, if A has constantly employed B as his agent to sell for him, and has accepted liability for contracts made by B so that A's customers have come to know B. as his agent, A should not without warning his customers terminate the agency, for if he does so he may still be made liable for contracts made by B professedly on his behalf—because by his conduct he has led people to believe that B. is his duly authorised agent Accordingly, when an agency is terminated by revocation or mutual consent (§ 55), the principal must take proper steps to inform persons who have been accustomed to deal with the agent. Third parties, until they have notice of the termination of the agency, are entitled to look to the principal for the performance of contracts entered into by the agent ostensibly on behalf of the principal.

§ 45. **Ratification**—Ratification of the acts done by one person on behalf of another is discussed by some writers under the head of appointment of agent. By ratification is meant the adoption by one person of a contract made by another on his behalf, but without his authority It is not every act of another person that can be ratified, so as to make the person ratifying a party to the act and responsible for it Where B. makes a contract professing to act on A's behalf, but without his authority, in respect of something that A. can lawfully do, A may adopt the contract and become liable on it, whether it be to his detriment or his advantage The ratification may be by

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either words or conduct But where a person professing to act on his own behalf and not as agent makes a contract on behalf of a third person but without his authority, such third person cannot afterwards ratify the contract so as to render himself able to sue or liable to be sued on the contract

§ 46. The Authority of Agents.—The authority of an agent may be express or implied

An authority is said to be express when it is given by words spoken or written The advantage of a written authority is that the written document furnishes excellent evidence as to the extent of authority conferred

An authority is said to be implied when it is inferred from the circumstances of the case For example, if A is in the habit of sending his servant B. to buy goods from C on credit, C is justified in supposing that the servant has authority to buy on credit If, however, the servant was in the habit of buying for cash, and he asks for goods on credit, the shopkeeper ought at once to inquire if the servant has authority to buy on credit If he has no such authority, the employer will not be liable to pay for the goods

The authority given to an agent may be special or general A special agent is authorised to do a specific act, as to purchase a horse His authority may be limited to purchasing a specified horse for a specified price A general agent is authorised to do any acts within certain specified limits, as to engage on behalf of his principal in the business of a horse-dealer

An agent authorised to do any act has authority to do every lawful act necessary in order to do such act Hence an agent employed to carry on a business may purchase all articles necessary to such business An agent employed to sell, may do everything requisite to effect a sale, *e g* he can sell on credit when this is the usage of the business, an insurance agent can adjust and settle a loss, a debt-collecting agent can give receipts

An agent must not exceed his authority, and for any acts done outside the scope of the authority and not for the benefit of the principal, the principal is not liable, unless he

has held out the agent as having a more extensive authority than he in fact has So if in negotiating a sale an agent makes fraudulent representations, the principal is not liable in an action of fraud unless (*a*) the agent in making such statements is acting within the scope of his actual or apparent authority, or (*b*) unless the principal has ratified the fraud by taking the benefit of the contract procured by the fraud.

§ 47 Duties of Agents —*Obedience* —An agent ought to observe the directions of the principal This is the primary duty of an agent, and any losses resulting from a failure to obey instructions must be borne by him All orders as to time, price, and quality should be observed In many cases a discretion is given to him, in such a case he may take what course seems best

In the absence of any instructions, he ought to follow the usual course of business at the place where the business is to be transacted

Skill.—The agent must conduct the business with as much skill as is generally possessed by persons engaged in a similar business An agent ought to possess the skill requisite to enable him to discharge what he undertakes If he is incompetent, and fails to disclose this incompetence to his employer, he must make good any resulting loss. Perfect skill is not required, only that which is ordinarily possessed by those engaged in the particular business in question.

Diligence.—The agent must not only possess sufficient skill and use it, but he must also act with reasonable diligence, *i e* with the diligence that would be shown by a competent man Hence if an insurance broker fails to have the usual insurance clauses inserted in a policy, he must make good any loss, or if an agent for sale sells on credit without making proper inquiries as to the solvency of the purchaser, he also must make good any loss

Emergencies — In all cases of emergency the agent should communicate with the principal This rule specially applies to the non-acceptance or dishonouring of bills of exchange.

Fidelity.—An agent is not allowed to use his position in

§ 36 **Stock.**—When the capital of a company is fully paid up it is often converted into *stock* Stock differs from shares in that (1) it is always fully paid up, so that a stock holder never incurs any liability for the debts of the company, and (2) it can be transferred in fractional parts If the original shares are £10 shares an investor can only hold capital in multiples of that sum, but if the shares are converted into stock he can be a holder of stock amounting to, say, £15 or £17 or any odd sum

§ 37. **Debentures.**—Companies often borrow money by issuing debentures or debenture stock A debenture is a document under the seal of a company given to secure the repayment of money advanced to the company, such repayment being usually secured by a charge on the whole or part of the property of the company A debenture may, however, be issued without any such charge The debenture holder looks to the property charged as the security for his money, and generally stipulates that he will be entitled to certain remedies in case the money is not repaid when due

A debenture holder is usually entitled to interest at a fixed rate before any of the profits of the company are distributed as dividends But a debenture holder is not as such a member of the company

§ 38. **Debenture Stock**—Debenture stock is a charge on the undertaking of the company prior to all shares or stock, and is entitled to interest before any dividends are paid. But holders of debenture stock cannot require repayment of their capital. A holder of debenture stock is, like a holder of debentures, a creditor, not a member, of the company.

§ 39. **Winding up.**—A company may be wound up (1) by the Court, (2) voluntarily, (3) voluntarily but under the supervision of the Court.

1. The High Court of Justice (or other Court having jurisdiction) will order a company to be wound up—

(*a*) When the company has passed a resolution resolving that the company be wound up by the Court

(*b*) When the company does not commence business

within a year from its incorporation, or suspends business for a year

(*c*) Whenever the number of members is less than seven

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Emergencies — In all cases of emergency the agent should communicate with the principal This rule specially applies to the non-acceptance or dishonouring of bills of exchange.

Fidelity —An agent is not allowed to use his position in

order to benefit himself beyond his agreed remuneration An agent for sale is not allowed to purchase for himself, unless he discloses every material fact to the principal, and obtains his consent If the agent deals in the business of the agency on his own account, he must hand over all profit made An agent must not use for his own purposes any materials or information which he has obtained for his principal whilst in his employment Fidelity to the principal is absolutely necessary

Accounts —An agent must always account to his principal for any moneys received or expended by him as agent He must also, where the course of the business requires it, keep proper accounts Failure to account will deprive the agent of his right to sue for his remuneration, and failure to furnish accounts to the principal on demand may render him liable to action

Moneys —All sums received on the principal's account should be paid over, but the agent may retain out of such sums any moneys due to himself in respect of advances made or expenses incurred in conducting the business, as well as his own remuneration Payment of remuneration is not, as a rule, due until the act authorised is done

An agent is entitled to retain any property, papers, or books of the principal until the amount due for commission and expenses has been paid

§ 48. **Duties of Principal to Agent.** — *Reimbursing Expenses* —The principal must reimburse the agent all the expenses he has necessarily incurred in carrying out the agency The agent cannot recover needless expenses

Payment of Remuneration —The principal must also pay the agent the agreed salary or commission The agent can, as we have seen, retain his remuneration out of moneys that come into his hands for his principal The agent may, however, forfeit his right to remuneration through misconduct

§ 49. **Duty to Indemnify Agent** —The principal must indemnify the agent against the consequences of all lawful acts done by the agent under the authority conferred upon him Hence if the agent by authority of the principal

brings or defends an action, the principal must reimburse him all costs incurred in such action

Wrongful Acts.—Where a principal directs an agent to do a wrongful act to a third party, and the agent, acting *bona fide*, and having no knowledge that the act is wrongful, obeys the direction, the principal must make good to the agent any loss he sustains Hence if the agent, by the direction of the principal, innocently makes a false representation as to the quality of goods, the latter is bound to indemnify the agent against the consequences of such misrepresentation

§ 50. **Position of Third Parties**.—As a general rule, all contracts entered into by an agent as agent, are regarded as entered into by the principal, so long as the contract is within the scope of the agent's authority It is immaterial whether the *name* of the principal be disclosed or not, provided the third party knows he is entering into a contract with *an agent* as such, and the parties intend that the principal shall be bound In order to protect himself from any liability, the agent should always take care that the contract is so drawn as to make the principal liable

It follows that, as a rule, an agent cannot enforce a contract entered into by him as agent on behalf of a principal, and that he incurs no liability on such contract But to this rule there are certain exceptions

1 Where the agent does not disclose the name of the principal, either the principal or the agent can be sued on the contract, for the agent by concealing the principal invites the other party to trust himself But there may be something expressed or implied in the contract to show that the agent is not to be liable So where a broker contracts "sold for my principals" without naming them, the broker is not personally liable

2 Where the contract relates to the sale or purchase of goods for a merchant resident abroad, it is presumed (unless a contrary intention is clearly shown) that the agent has not authority to pledge the foreign merchant's credit, and that he is [illegible]sonally liable.

3 Where the agent contracts to be personally liable, he is liable.

4 An agent may be personally liable by the custom of a particular trade

5 Where the agent has an interest in the subject matter of the contract, the agent may sue or be sued equally with the principal An auctioneer, for example, is entitled to have his commission paid out of the purchase money, and can therefore sue the buyer.

§ 51 **Undisclosed Principal**—If an agent does not disclose the fact that he is agent, the third party may be entirely ignorant that he is dealing with an agent In such a case the agent is liable to the third party, but if the third party discover that there is a principal, he may elect whether to proceed against the agent or the principal B, for example, acting as agent for A, but not disclosing the fact of agency, sells goods to C, C is entitled to look to B. for completion of the contract, but if C. finds out that A was B's principal, he may sue either A. or B. The principal, if he desires to enforce the contract, can only do so by submitting to all rights and obligations existing between the agent and the third party In other words, if performance is sought by the principal from the third party, the third party is to have the same rights as if he were sued by the agent

§ 52 **Falsely representing Oneself to be Agent.**—If a man who has no authority to act as agent professes to enter into a contract on behalf of another, and there is a principal named who might adopt the contract, but does not do so, the agent can neither sue nor be sued on the contract The agent is, however, liable to the third party for pretending to be an agent

But if there be no principal who could adopt the contract, *e.g.* where the alleged principal is fictitious, the agent is held to have contracted in person, and may be sued as principal by the third party

§ 53. **Position of Special Classes of Agents**—Special rules, derived partly from the usage of trade and partly from statute, apply to certain classes of agents.

Factors—A factor has, as we have seen, possession of the goods He is entitled to sell them in his own name, he may sell on the usual terms as to credit, and receive and give a receipt for the price. His right to remuneration is protected by the lien[1] given him by law for the balance of account as between him and his principal So long as the goods are in his possession, a third party who has no notice of the revocation of the factor's authority is protected as regards any lawful dealings with the factor relating to the goods A factor has implied authority to pledge goods entrusted to him (§ 48)

Brokers—A broker for sale is employed for the purpose of negotiating a sale As soon as the contact is arranged, his duties are, in the absence of any agreement to the contrary, at an end He differs from a factor in that, except by special custom in certain trades,[2] he cannot sell in his own name, he cannot sue or be sued on the contract, he has no authority to receive money, and, not being entrusted with the goods, he has no lien

Auctioneers—An auctioneer is an agent for the public sale of property Until the fall of the hammer he is the agent of the seller alone, but when the hammer falls he is agent of both parties to do what is necessary to make the bargain binding, under the Statute of Frauds (§ 148).

He has possession of the goods, is responsible for them whilst they are in his charge, and has a lien on them for his commission and expenses He should receive payment in cash, but may, if he is specially authorised, or it is the custom in the particular trade so to do, accept payment by cheque

§ 54 **Sub-agents**—An agent cannot, as a rule, employ another person to perform what he has undertaken to do, as the principal is supposed to have employed the agent to do the thing himself

[1] A lien is a right in a person who has possession of the goods of another to retain possession of, but not to sell, them until payment of a debt due from such other

[2] For instance, stockbrokers, in accordance with the usage of the Stock Exchange, both pay for and receive shares on behalf of their principals.

By the custom of trade in certain trades, or by consent of the principal, sub-agents may be employed In choosing a sub-agent as much diligence will be required of the agent as in the execution of the undertaking

Where a sub-agent is properly employed, he represents the principal as regards third parties, just as if he had originally been appointed by him, and he is responsible to the principal for the due performance of the duties which his employment throws on him

An agent should be careful not to appoint a sub-agent until he has satisfied himself that he has authority so to do. If it should turn out that no such authority existed, the agent and not the principal will be bound by the acts of the sub-agent towards both the principal and third parties

§ 55. Termination of Agency. — The relation of principal and agent may be terminated in the following ways —

1 By mutual consent

2 By revocation on the part of the principal

As a rule, the principal can at any time revoke the agent's authority without the agent's consent, but there are some cases in which he cannot do so, as, for instance, when as a result the agent would be exposed to loss or suffering

3 By the agent renouncing the business

An agent may withdraw from the agency, but if the agency was undertaken for a consideration, the agent must make good to the principal any loss arising from the renunciation

4 By the completion of the business, and the expiration of the time for which the agent is employed

5 By the death of either principal or agent

No contract entered into by the agent after the death of the principal is binding on the estate of the deceased principal, even though the third party dealing with the agent has no notice of the death

6 By the principal or agent becoming of unsound mind

7 In most cases by the bankruptcy of the principal, and in some by the bankruptcy of the agent

§ 56 **Authorities.**—Sir William Anson's work on the Law of Contracts contains the leading principles relating to agency *Principal and Agent*, by Mr Blackwood Wright, and Mr Bowstead's *Digest of the Law of Agency* discuss the subject in detail.

PART II

CONTRACTS

CHAPTER I

THE FORMATION OF CONTRACTS

§ 57. Definition of a Contract.—A contract is an agreement enforceable by law

This definition of a contract does not profess to enumerate all the elements that are required to constitute a contract. It merely embodies two of the more important characteristics of every contract, viz (1) that a contract is an agreement, and (2) that it is an agreement that the law will enforce. It is therefore necessary to examine the nature of an agreement, and to enumerate the various elements an agreement must possess, in order to be regarded as a contract

§ 58. What is an Agreement.—An agreement is an offer or proposal by one person made to and accepted by another person relating to some act to be done or not to be done by one of such persons towards the other

An agreement therefore implies (*a*) two persons at least, (*b*) an offer, and (*c*) an acceptance.

Two parties at least are required to every agreement, since it is the result of a common intention expressed by two or more minds Either party may be a natural person,

e g a man or a woman, or an artificial person, *e g* a corporation The limitations that the law has imposed on the capacity of particular persons of entering into contracts will be considered later on.

§ 59. Offer and Acceptance.—Every agreement, no matter of how complicated a nature, may be resolved into (1) an offer on one side, and (2) an acceptance on the other The simplest type of agreement is where A. says to B, "Will you buy 1000 yards of cloth at 6d per yard?" and B replies, "Yes" A more complicated case is where a long correspondence takes place between buyer and seller, eventually resulting in goods being sold. But all the stipulations and conditions contained in the letters can be thrown into the form of an offer and an acceptance An offer may also be made by advertisement, as, for example, where a reward is offered to any person who will restore lost property, the restoration of the property amounts to an acceptance A bid at an auction is an offer; the fall of the hammer an acceptance of the highest bid Many other simple forms of offer and acceptance have been introduced by the custom of trade

§ 60 Intention to invite Offers —In some cases it is difficult to say whether there is an offer or merely an intimation that offers are or will be invited For instance —

A. advertises that he has goods to sell at a certain price B goes to his shop and says that he will take the goods at the advertised price Is B's statement to be regarded as an acceptance of an offer made by A., or is it to be taken merely as an offer by B which A is entitled to refuse? The answer depends in this as in other cases entirely on what was the real intention of the party in advertising, such intention to be collected from the nature of the transaction

It has been held that the advertisement of a sale by auction does not amount to such a definite offer to sell the goods that there is a contract with those who attend the sale to the effect that the goods will be sold The courts regard such an advertisement, if made in good

faith, as an intimation of an intention to sell, and not as a binding undertaking to sell On this principle an advertisement of a sale by tender is merely an invitation of offers, and does not imply that the highest offer will be accepted

§ 61. Communication of Offer and Acceptance.—The parties must communicate to one another their common intention Unless the offer be communicated, there is no opportunity for acceptance, and a mere intention to accept has no legal effect If A offers to sell goods to B, and B resolves to buy them at the price mentioned, but never communicates his intention to A, there is no agreement for the sale of the goods The communication of the acceptance may, as we have seen, take the form of the doing of an act For example, when an order is sent for goods, the offer to purchase implied in the order may be accepted formally, or by the actual sending of the goods

§ 62. When is the Communication complete?—The communication of an acceptance is complete when it is put in course of transmission to the proposer, so as to be out of the power of the acceptor As a proposer may revoke his proposal before acceptance, it is of great importance to determine the point of time from which an acceptance dates Where the acceptance is oral no difficulty occurs, but where the acceptance is made by letter or telegram, the question arises, does the acceptance date from the moment of posting the letter or sending the telegram, or from the moment when the letter or telegram is received by the proposer? It has at length been decided that where an offer is made by letter or by telegram, the acceptance is complete the moment the letter of acceptance or the telegram is posted Some say that the rule is based on the principle that where A. makes an offer to B by letter, A. is understood to authorise B to send an acceptance by post

The acceptance being complete the moment the letter is posted, it follows that there is a binding contract, though the letter containing the acceptance is never received The letter may be lost during transmission, but both persons are bound by the contract

If it is desired to exclude the operation of the rule, the offer should state expressly that the acceptance is not to be binding until the acceptance has been received

An acceptance may be implied from the conduct of the acceptor An omnibus company by running its omnibuses offers to carry safely any person who pays the fare The getting into an omnibus is an acceptance In the case of an order for goods, the offer as we have seen may be accepted by the sending of the goods

§ 63. Nature of the Acceptance — The acceptance must be absolute and identical with the terms of the offer

If there is any variation between the offer and the acceptance, there is no agreement, and the acceptance with its variation is regarded as a new proposal

A offered to sell B a quantity of "good" barley, and B replied by accepting the offer of the "fine" barley As it appeared that the words "good" and "fine" were used in the trade to denote different qualities, it was decided that there was no acceptance.

When a broker is employed to sell goods, he is regarded as an agent to act for both buyer and seller. He sends to the seller a "sold note," and to the buyer a "bought note." Both these notes ought to be identical, since if they vary in their terms, *e g* as to description of goods, or as to mode of payment, it may be held that there is no contract

The acceptance of the offer must be by the person to whom the offer is made. A. sent an order for goods to B, who, unknown to A., had sold his business to C The order was opened by C and executed by him, but it was held that C could not recover the price of the goods from A, inasmuch as the original offer had been made to B and not to C

An acceptance should be made within a reasonable time If an offer is not accepted within a reasonable time it is regarded as no longer open, or lapsed. What is a reasonable time depends upon the circumstances of the particular case. Sometimes the party making an offer fixes a time within which the offer must be

accepted In such cases the offer must be accepted within the time named

§ 64. Revocation of Offer.—An offer may be revoked up to the moment of acceptance, but not afterwards

Until the offer is accepted there is no legal relation between the parties, and therefore the proposer may at any moment revoke his offer Hence a bidder at an auction may withdraw his bid before the hammer falls A merchant who has ordered goods by post may withdraw the order provided an acceptance has not been posted

An offer may be revoked though it expressly allows a certain time for acceptance

Very frequently a proposal contains a statement that the offer will be kept open until a certain day or a certain hour For instance, A writes to B making him an offer of certain goods, and stating that he will keep the offer open for a certain time A. is not bound to keep the offer open for such time, since he is under no legal duty to do so His words are regarded merely as an intimation that after the expiration of the time mentioned the offer will not continue Hence where three days were given by a merchant to an intending buyer of goods to make up his mind, and within the three days the buyer went to the seller for the purpose of accepting the offer, but before he accepted the offer the seller declined to sell, saying he had offered the goods elsewhere, it was held that this amounted to a revocation, and that there was no contract

A tender to supply goods during a stated time to a company or institution made in reply to an advertisement, is an offer that may be revoked during the period the time is running By giving orders from time to time on the terms of the tender, the company or institution convert the tender into a binding contract for all goods actually ordered, but this does not prevent the party tendering from withdrawing as regards any future supply

§ 65. Express and Implied Revocations.—The revocation may be either express or implied

Express notice may be given by letter or telegram, or orally, and in order to prevent all misunderstanding, it is

desirable always to give notice expressly The form of the notice is immaterial, but it must be given by the proposer or his agent duly authorised

Implied revocation is a revocation implied from the conduct of the parties For instance, if A. offers goods to B, but before B accepts A sells them to C If B has notice or knowledge of such sale he cannot proceed to accept A's offer The sale to C is regarded as an implied revocation of the offer made to B It is therefore very desirable that a merchant who has made an offer of goods to one person should not sell them to another until he has withdrawn his first offer

§ 66 **Communication of Revocation.**—A revocation, to be effective, must be brought to the knowledge of the person to whom the offer is made

A revocation not communicated is altogether inoperative. An intention or determination to revoke an offer is not sufficient "The law," says Sir W Anson, "regards the offerer as making his offer during every instant of time that his letter is travelling, and during the period which may be considered as a reasonable time for acceptance." The party to whom the offer is made is therefore entitled to consider that it is still being made, unless he hears to the contrary, and that his acceptance concludes a binding contract This is clearly so in the case of an implied revocation For instance, A offers goods for sale to B, but before B accepts, sells them to C Until B is informed of the sale to C, he is entitled to accept A's offer, and if in ignorance of the sale to C, he accepts A's offer, there is a contract, for breach of which he can sue A. for damages

§ 67. **From what time Revocation dates.**—The communication of a revocation is not complete until it is received

We have seen (§ 62) that the communication of an acceptance by post is complete the moment the letter is posted, but in the case of a revocation the communication is not complete until it has actually reached the proposer. A Cardiff firm wrote on the 1st October to a New York firm offering 1000 boxes of tin plates at a certain price, and

asked for a reply by cable On the 8th October the Cardiff firm wrote a letter withdrawing the offer The first letter containing the offer reached New York on the 11th October, and the New York firm at once cabled accepting the offer On the 20th October the letter withdrawing the offer was received The Cardiff firm refused to forward the goods, alleging that they revoked their offer by their letter of the 11th October, but the court held that the revocation could only date from the 20th October, the date the second letter was received, and inasmuch as the offer had been duly accepted on the 11th, there was a binding contract

§ 68. **What Agreements are Contracts?**—Assuming the offer not to be revoked, but accepted, there arises an agreement But an agreement of itself is not enforceable at law It is therefore necessary to ascertain what agreements the law will enforce Briefly stated, an agreement to be enforceable must possess three characteristics:—

1 The parties to it must possess legal capacity to enter into the agreement
2 The agreement must (unless made under seal) be supported by a consideration
3 The subject-matter must be lawful

These three conditions will now be considered

CHAPTER II

CAPACITY OF PARTIES TO CONTRACT

§ 69 **General Rule**.—Every natural person who is of full age and of sound mind, and is not specially disqualified by law, is competent to enter into a contract

No distinction is now drawn between subjects and aliens as regards capacity to contract, but alien enemies are subject to certain disabilities during war

The capacity of a corporation to contract depends upon the powers expressly or impliedly given to it in the charter or statute by which it is created.

INFANTS

§ 70.—A person under the age of twenty-one is an "infant" The position of infants in regard to contracts may be summed up in the following propositions —

(*a*) Contracts made with infants relating to (1) loans of money, (2) sales of goods other than necessaries, and (3) accounts stated,[1] are absolutely void

(*b*) An infant is bound to pay a reasonable price for necessaries supplied to him

(*c*) Contracts for education and of apprenticeship and of service when they are beneficial to the infant are binding on him

[1] An account stated is an admission of liability upon an account taken between two persons If A and B make out an account of their cross liabilities showing a balance in favour of B, and A thereby admits he is indebted to B for the balance, B can sue A. on such admission as an account stated

(*d*) Some contracts, such as partnership agreements, are binding on infants unless repudiated, and all others may be avoided by him either before or within a reasonable time of his coming of age

§ 71. Void Contracts of Infants.—It follows from the propositions above laid down that if a merchant or shopkeeper supplies to an infant goods which are not necessaries, or if a money-lender lends him money, the merchant, the shopkeeper, or the money-lender, has no remedy against the infant The infant may keep the goods or the money and may pay what is due if he likes, but he is not bound to do so Even if at the time of making the contract he fraudulently represent himself to be of full age, the contract is void The courts will not, however, allow any person, even an infant, to take advantage of a fraud And though they must bow to the rule that the contract is void, they will, on the ground of the fraudulent misrepresentation, compel the infant to restore the goods or the proceeds thereof if still in his hands

§ 72. Contracts of Infants for Necessaries.—It is an old rule that an infant may enter into a binding contract for the supply of "necessaries" for his own use "The word 'necessaries,'" said Baron Parke, "is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree, and condition of life in which he is" Food and clothing are examples of necessaries, but it would be impossible to give a complete list, inasmuch as what would be regarded as necessaries at one time or to one person, would be held not to be necessaries at another time, or to another person Luxuries and ornaments, such as cigars and jewellery, are not regarded as necessaries except under very special circumstances It is for the judge before whom the case is tried to say whether the articles can reasonably be considered as necessaries at all, but if he thinks they can, the jury will be asked to say whether the particular things supplied are, in the particular case, necessaries A few examples taken from decided cases will illustrate the above principles

Livery for a servant, a horse, and a regimental uniform were regarded as necessaries where they were specially suitable to the position in life of the infant On the other hand, a pair of jewelled solitaires that cost £25 were held not to be necessaries for a young man of large fortune. A watch may be a necessary, but its price must bear some relation to the circumstances of the purchaser

§ 73. Contracts of Apprenticeship and Service — An infant may bind himself by articles of apprenticeship, and may enter into a contract of service, and if the contract is as a whole reasonable and beneficial for him it will be enforced against him In some trades there is a statutory limit of age below which an apprentice cannot bind himself apprentice

§ 74. Contracts binding unless Repudiated —If an infant takes shares in a company on which there is a liability to pay calls, or enters into articles of partnership, or takes a lease, he is bound *unless he repudiates* within a reasonable time of his coming of age

§ 75. Voidable Contracts of Infants.—Formerly an infant was allowed, on coming of age, to ratify any contract that he had entered into during infancy, but in 1874 this power was taken away by the Infants Relief Act, which enacted that no action can be brought against a person upon any promise made after he attains his majority, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy And now all contracts of an infant except those hitherto mentioned are voidable by him at any time That is to say, he can enforce them, but may refuse to be bound by them, even though after coming of age he has ratified them.

Married Women

§ 76 Old Rule —The old common law regarded a husband and wife as one person, and disqualified the wife from entering into contracts binding on her personally The

custom of the City of London, however, permitted a married woman to trade, and for that purpose to make valid contracts, and to sue and be sued in the City courts, and by personal service a woman might acquire contractual rights, but in that case the husband had to be a party to any action brought by or against her

§ 77. **Separate Property.**—At common law the personal property of a wife belonged to the husband, and he acquired by marriage important interests in her real property In short, subject to certain limitations, the property of the wife belonged to the husband In course of time the doctrine came to be established that a married woman might by means of a trustee hold property for her own use independently of the husband To such property the term "separate estate" was applied Not only was she allowed to hold such property, but she was allowed to enter into contracts regarding it Such contracts were regarded as not binding her personally, but as only binding the separate estate In other words, if she were sued on a contract and judgment was recovered, she could not be committed to prison for refusing to pay The doctrine of separate estate has been greatly extended by Acts of Parliament, but the principle still remains that the contracts of a married woman bind her separate property only The Married Women's Property Act 1882 enables a married woman to acquire, hold, and dispose of property as if she were a single woman without the intervention of a trustee, and further enacts that "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract," and of suing and being sued, as if she were a single woman

There is a method by which a married woman may be prevented from binding her separate estate, viz by using in the instrument granting her the property words restricting her from alienation In such a case she has no power to bind her estate by contract This disability lasts during marriage, and if the marriage is dissolved or she becomes a widow the power to contract revives

§ 78 **Contracts binding Separate Property.**—It is not

essential to the validity of the contract that at the time it is made the married woman should have separate property A contract made by a married woman is deemed to be entered into by her with respect to her separate property, whether in fact she has any or not, and binds all separate property which she has at the time, or afterwards becomes possessed of, or entitled to

§ 79 **Enforcing Judgment against a Married Woman** —A judgment against a married woman can only be enforced against her separate property She cannot be imprisoned for refusing to satisfy a judgment although she have the means to do so, and unless she is carrying on a trade she cannot be made a bankrupt

§ 80 **As Agent for Husband.**—A married woman may be the agent of her husband to bind him by contracts made by her on his behalf The burden of proving that the wife has authority rests with the party seeking to enforce the wife's contract against the husband But when a married woman resides with her husband there is a presumption that she has his authority to bind him by contracts for the supply of necessaries for the household This presumption may be negatived by showing that in fact he has forbidden her to pledge his credit

Moreover, a wife who is separated from her husband without her fault has authority implied by law to pledge his credit for necessaries, if he fails to support her in a manner suitable to his station The husband cannot deprive the wife of this authority If, however, the wife voluntarily leaves the husband's house and lives apart, she loses all right to pledge his credit, and those supplying her with goods do so at their own risk

Corporations and Companies

§ 81. **Definition** —A corporation is an artificial person created by law having a perpetual succession and a distinctive name Not being a natural person, it can only contract through an agent, and such agent must have the requisite authority to enter into the contract

§ 82. Powers of Contracting.—The powers of a corporation to enter into contracts may be expressly defined or limited in the instrument of incorporation. Where this is not the case regard must be had to its constitution and the purposes for which it is created to ascertain what are the limits of its power to enter into contracts. In the case of limited companies, the powers of contracting are defined in the "memorandum of association." A contract which is beyond the powers of a corporation is *ultra vires* and is void.

§ 83. Form of Contracting.—As a general rule, a corporation can bind itself by contract only by a deed, *i.e.* by a writing under its common seal. To this there are many exceptions. Where the matter is of slight importance or of daily occurrence the seal is not necessary. Hence the agent of a corporation may engage clerks, and the guardians of a poor law union may order ordinary provisions for a workhouse, by word of mouth. Trading corporations may enter into contracts in the usual course of business without the corporate seal (§ 94).

Lunatics

§ 84. Contracts for Necessaries.—Every person is presumed to be of sound mind until the contrary appears. It may, however, occur that one of the parties to a contract is of unsound mind, and the question arises what effect has this on the contract or on the capacity to contract. "Of unsound mind" means incapable of understanding the effect of the contract.

If necessaries are supplied to a lunatic he is bound to pay a reasonable price for them. The debt is chargeable against the lunatic's estate. By necessaries is meant articles necessary to the estate and condition of the lunatic.

§ 85. Contracts during Lucid Intervals.—A lunatic differs from an idiot in that he may at times have lucid intervals, *i.e.* be perfectly sane. During such intervals he can enter into a contract. But so long as the insanity lasts

the lunatic is regarded as incapable of understanding the nature and consequences of any legal act

§ 86 **Contract with Notice of Insanity.**—A contract made by a person in such a condition is voidable at his option if the other party knew, or had reasonable grounds for believing, that he was of unsound mind, but not otherwise "Voidable at his option" means that when the lunatic recovers his sanity he may elect either to avoid or to affirm the contract

§ 87 **Contracts without Notice of Insanity**—Where a person contracts with another without any notice of insanity, the contract is valid Hence where a person of unsound mind bought annuities from an insurance company, and the company had no knowledge of the insanity, it was held after the death of the lunatic that the purchase ought not to be set aside

§ 88 **Effect of Insanity subsequent to a Contract**—The fact that one of the parties to a contract becomes insane subsequently to the making of the contract, does not usually affect its validity But the insanity of the principal revokes the authority of an agent, and insanity of an apprentice or servant probably terminates his engagement Insanity of a partner does not of itself put an end to a partnership, but may be a ground for dissolution of partnership by the Court

§ 89 **Drunkenness**—A person who by reason of drunkenness has placed himself in a condition analogous to insanity, is regarded, as far as the capacity to contract is concerned, as of unsound mind The same rules apply as in the case of lunacy If therefore a person enters into a contract with another, knowing him to be so drunk as not to understand what he is doing, such contract is voidable by the party of whom advantage has been taken

CHAPTER III

THE FORM OF AND CONSIDERATION FOR CONTRACTS

§ 90. Classes of Contracts.—An agreement, in order to be enforceable as a contract, must be entered into under seal, or be supported by valuable consideration Hence there are two kinds of contracts in English law (1) contracts under seal, and (2) simple contracts [1] Certain contracts belonging to the last-mentioned class require, in addition to a consideration, that they should be embodied in a certain form, *e g* in writing Simple contracts may therefore be divided into two sub-classes (1) those requiring, (2) those not requiring a special form.

Contracts under Seal

§ 91. How entered into.—A contract under seal is entered into by the delivery of a written or printed document bearing the seal of the person making delivery The document may be written or printed, with pen and ink or

[1] There is another kind of obligation which is technically a contract in English law, namely, a debt or contract of record, of which the most familiar example is a judgment debt, *i e* a judgment for a sum of money recovered in a Court of Record Though technically these debts are "contracts of record" they are not contracts within the definition of contracts above given, as they are not agreements, and they have little in common with the contracts dealt with in this work

pencil, upon paper or parchment If both parties are to be bound, the document should bear both their seals It follows that a contract under seal requires three requisites (1) writing or printing, (2) sealing, and (3) delivery Signing may be added as a fourth requisite, though there is good reason for saying that, except in certain special contracts, it is not absolutely essential The document is called a deed

§ 92. Sealing and Signing —The deed must bear the seal or seals of the party or parties to be bound The use of sealing wax and of a seal to make an impression on the wax is unnecessary, a wafer or an impression made by an instrument is sufficient The signatures of the parties ought always to be added to a deed, but by law they are only absolutely essential in certain cases

§ 93. Delivery —The "delivery" of the deed makes the deed take effect as regards the party making the delivery The actual handing over of the deed is the simplest form of delivery, but the use of any words indicating that the person wishes the deed to become operative will amount to delivery

Usually the seals are affixed beforehand, and the party executes the deed by placing his finger on the seal, saying, "I deliver this as my act and deed" This amounts to both sealing and delivery The importance of delivery lies in the fact that the moment it takes place the deed takes effect

The delivery may be made conditionally, and then the deed does not take effect until the condition is performed Until such performance the deed is called an escrow

If any of the material parts of a deed are omitted and delivery is made, the deed is void and the omissions cannot be subsequently supplied The document when completed should be re-executed The omission of an immaterial part, such as the date, will not invalidate a deed

Shares in limited companies are usually transferable by deed. Sometimes the deed of transfer is executed without the name of the purchaser being inserted. Such a transfer does not pass a legal title to the shares, though it may give

a right to have the shares duly transferred The practice of the Stock Exchange in allowing the purchasing broker to fill in the name of the buyer, is not recognised by the courts

§ 94. Contracts that must be made under Seal.—In ordinary commercial transactions, such as the selling and buying of goods, it is not necessary to use a deed But contracts entered into by corporations must sometimes be under the seal of the company

A corporation such as a municipal corporation or a joint stock company is an "artificial person" The corporation itself must be distinguished from the persons composing it Every corporation has its own special seal, and the presence on a document of an impression made by such seal is evidence that the corporation was a party to the document The affixing of the seal makes the document perfect, and delivery is not required, as in the case of deeds made between individuals

§ 95. Trading Corporations.—In the case of a trading corporation it would be very inconvenient to carry out the rule in every case, and it has been established that a *trading* corporation may by its agents and servants enter into simple contracts relating to the objects and purposes for which the corporation was founded. Hence where a gas company orders gas meters, or an iron company iron rails, or a shipping company ship provisions, the contract is good though not made under seal To require a seal would tend to prevent the company from carrying out the objects for which it was founded For similar reasons a trading company may draw and accept bills of exchange

It must, however, be remembered that if the contract does not relate to the purposes for which the company was incorporated, it will not be binding on the company unless the company's seal is attached For instance, where a company of copper miners gave an order for iron, it was held that this order was so far away from the business of the company that it ought to have been under seal

In the case of companies incorporated under the Companies Acts and some other Acts of Parliament, the

legislature has gone further and enacted that the seal of the company is only required for contracts which would have to be under seal if made by individuals In all other cases contracts entered into by them through their agents, by word of mouth or in writing, are binding without the company's seal This rule applies to most trading companies

§ 96. **Non-Trading Corporations** —In the case of non-trading corporations, such as municipal corporations, the rule requiring all contracts to be under seal is relaxed as regards contracts relating to matters of trifling or of daily occurrence, such as the hiring of a servant, or the ordering of necessaries for a workhouse, as well as regards contracts of urgent necessity such as those relating to repairs, necessitated by the severity of the weather or other emergency

But it is desirable in all contracts of any importance to obtain the seal of the corporation, unless the legislature has expressly exempted such contracts from the necessity of sealing

§ 97. **Assignments** —Assignments of property must not be confused with contracts to assign The assignment is made in pursuance of a contract, and actually passes, or is a step in passing, the property assigned. Thus a contract to sell shares is one thing a transfer of the shares is executed in performance of the contract In the case of many companies a transfer of shares must be by deed, but the contract need not be So too a lease of land for more than three years must be by deed, though an agreement to execute a lease need not be.

Simple Contracts

§ 98. **A Consideration necessary** —It is a principle of English law that if an agreement is not under seal, it must, in order to be enforceable, be supported by some consideration As mercantile contracts are seldom made under seal, it may be laid down as a general rule that mercantile agreements, in order to be binding, must be supported by a con-

sideration Special statutes require in addition certain contracts to be in writing, so that a distinction may be drawn between (1) contracts that require both writing and consideration, and (2) contracts that require a consideration only

§ 99 Contracts required to be in Writing.—The following are the chief examples of contracts relating to mercantile transactions that are required to be in writing —

1 Bills of exchange, acceptances, and promissory notes

2 Contracts of marine insurance

3. The acknowledgment of a debt otherwise barred by the Statute of Limitations A creditor cannot recover a simple debt after six years have elapsed, unless the debtor before the expiration of such six years makes a payment on account or gives an acknowledgment that he owes the money Such acknowledgment must be in writing and be signed by the debtor or his agent

4 Any promise made by one person (A) to another person (B) to answer for the debt, default, or miscarriage of a third person (C). For instance, where A promises B that if he (B.) will supply goods to C, he (A) will be answerable for the price of the goods if C does not pay, B should not supply the goods unless the promise is reduced to writing It will be observed that it is assumed that the third person (C) obtains the goods on credit, he is therefore primarily liable to pay A undertakes to be liable in case C does not fulfil his promise. In all such cases the rule applies, and the promise should be given in writing, and be signed by the promiser or his agent authorised for that purpose If no writing be given, and C fails to pay for the goods, no action can be brought against A

5 Any agreement not to be performed within the space of one year from the making thereof.

This rule is applied only to agreements that clearly show by their tenor that the parties contemplated that the contract should not be completely performed within the space of one

year from the making of the contract For instance, a contract of partnership for ten years, a sale of goods where the goods are not to be delivered or paid for until after the expiration of twelve months, a contract of service for three years—such contracts indicate the intention of the parties to postpone performance for one year

But if the contract is so framed that no such intention is indicated, and it is one that may be performed within the year, or if it appears that it is intended that it shall be performed within the year by one of the parties, then it is not within the rule · for instance, a contract to deliver goods within six months, and to receive payment within eighteen months, or a contract to pay money upon the happening of some event which may happen at any time

6 Contracts for the sale of goods of £10 in value or over, where there is not an acceptance and actual receipt of part of the goods or something given in earnest to bind the contract or in part payment

Inasmuch as wholesale transactions are usually for goods of a greater value than £10, and are entered into without an immediate tender of the goods or the price, this class of contracts embraces the greater number of wholesale purchases and sales The above rule is based on the 4th section of the Sale of Goods Act It is fully discussed in the chapter dealing with the sale of goods (Part III ch 1)

§ 100 **Oral Contracts** —We now pass to those contracts that need not be expressed in any particular form, that is to say, contracts that may be entered into by word of mouth. The class is a very important one It includes all sales where the value of the article sold does not amount to £10, and as many single retail transactions relate to goods under £10 value, it will be understood that an enormous number of these contracts are entered into during the course of the year

As a matter of fact, oral contracts for the sale and purchase of goods of a greater value than £10 are daily entered into Though such contracts are in many cases not en-

forceable, the force of commercial opinion ensures their due observance If it became known on any exchange that a particular merchant was in the habit, when convenient, of disregarding his contracts on the ground that they ought to have been put in writing, no one would enter into business relations with him

Reference has already been made to the fact that a contract in writing (as distinguished from a contract under seal) requires what in law is called a consideration The same principle applies to oral contracts. We may therefore lay down the following rule —Every contract, whether written or oral, not being made under seal, requires a consideration

§ 101 What is a Consideration?—The simplest example of a consideration is money A buys goods from B. at a price of £20 The £20 is the consideration promised by A to B for the goods But the goods themselves may be regarded as the "consideration" given to A by B in exchange for the money

But a consideration need not necessarily be money or goods, it may be some service or task For instance, if a carrier undertakes to carry your luggage for a certain sum, the carrying of the luggage is a sufficient consideration to give rise to a valid contract.

The consideration may also be an omission to do that which a person is entitled to do For instance, A may be entitled to sue B for a debt, A. may agree not to sue for a time provided an extra £5 be paid down; here the consideration given by B is £5, the consideration given by A. the giving of time for payment

Consideration therefore may be some advantage conferred on the person receiving it, or some disadvantage incurred by the person giving it

A consideration then is a *quid pro quo*, and it is the legal term used to denote the "something" that every person must give in order to obtain "something" in return

§ 102 Executed, Executory, and Past Considerations —When a consideration is the doing of an act, and the act

is done at the time the contract is entered into, the consideration is said to be "executed", but if the act be not done at the time of entering into the contract, the consideration is said to be "executory" A "past" consideration is one executed and past before the contract is made We shall see later on that an "executed" or an "executory" consideration is, but a "past" consideration is not, sufficient to support a simple contract.

§ 103. Rules relating to Consideration — (*a*) The amount of the consideration given is immaterial so long as it is of some value

The law leaves the parties to make their own bargain It insists that there shall be some price, but leaves the price to be fixed by agreement. If therefore a merchant in want of money sells his goods at a very low price, he cannot afterwards upset the sale on account of the small price he received. Gross inadequacy of consideration is some evidence of fraud, and the courts will set aside a fraudulent transaction But mere inadequacy of consideration is not of itself any ground for avoiding a contract § (122)

(*b*) A promise to do that which a man is bound to do will not amount to a consideration

A promise by A to B to do that which he (A.) is already legally bound to do is of no advantage to B, because B knows that the act must be performed in any case It will not therefore be consideration for something promised on the part of B The asking of time for payment of a debt is a good example of this type of case A creditor is pressing a debtor for payment, and is threatening legal proceedings The debtor asks for a fortnight's delay, and the creditor grants it, but before the fortnight expires he issues a writ The debtor cannot legally complain If he sets up as a defence the promise by the creditor to give further time, the answer will be that as the debtor was legally bound to pay at once, he gave nothing in return for the promise to wait, and therefore the promise of the creditor was not binding On the other hand, if the debtor had given something for the extra time, then there would have been a valid contract

(*c*) The consideration must not be so vague that it would be impossible for a court to enforce it.

(*d*) The consideration must be lawful

The promise to do an unlawful act will not be a good consideration And if any part of the consideration is illegal, it generally renders the whole transaction illegal (§ 75).

(*e*) The consideration must not be a past benefit.

This rule may be best explained by an illustration. A purchased a horse from B At a subsequent time A. inquired if the horse was sound, and B thereupon gave A a warranty of soundness In other words, B entered into a contract with A. to the effect that he warranted the soundness of the horse Such a warranty was not binding, inasmuch as A gave B nothing—no consideration for it Had the warranty been given at the time of the sale it would have been binding as part of the transaction.

§104 **Waiver of Exemption from Liability**.—A debtor, as we have seen, is not bound to pay a debt after six years have expired The debtor may, however, waive his right, and if he promises to pay the debt even after the six years have expired, he will be bound by his promise In this case it is said that the consideration for the promise is the pre-existing debt

§105. **Proof of Consideration**.—The plaintiff who is trying to enforce a simple contract must show that he gave some consideration to the defendant in respect of the defendant's promise The holder of a bill of exchange is not bound by this rule If he is suing another party on the bill, the burden of showing that no consideration was given lies on the defendant

CHAPTER IV

THE LEGALITY OF THE AGREEMENT

§106. Introductory.—We have seen that an agreement, to be enforced as a contract, must not be unlawful The question then arises, What agreements are unlawful? In answering this question no attempt will be made to enumerate all the various kinds of unlawful agreements, as it will be sufficient for the purposes of this work if attention be directed to the leading unlawful agreements relating to trade

§107. Where the Object is Unlawful.—An agreement for an unlawful purpose is void An unlawful purpose is one that is prohibited by law It is unlawful, for instance, to sell goods to be shipped in a prohibited trade, or to sell beer to be retailed without a license In all such cases the seller, if not voluntarily paid for the goods, cannot recover the price Upon the same principle money lent for an illegal purpose cannot be recovered

Moreover, an agreement is unlawful and cannot be enforced if it is in violation of some important moral rule or contrary to public policy So an agreement to hire a brougham for the purpose of carrying on the calling of a prostitute or an agreement not to marry or not to prosecute a criminal is unlawful and cannot be enforced

§108 Where an Insurer has no Interest in the Policy.—A contract of insurance is illegal when the person insured has no interest in the subject matter of the insurance. The object of this rule is to prevent insurances being entered into by way of wager.

The same principle is applied to life and fire insurance A man may insure his own life, but he cannot insure the life of another unless he has an "interest" in such life at the time of effecting the insurance, and only a person who has an interest in property can insure it against loss by fire (§ 176)

§ 109. Where Goods are sold on Sunday.—By a statute passed in the reign of King Charles II, tradesmen are prohibited under a penalty from exercising their callings on Sundays An action cannot be brought upon an agreement made in violation of the statute, and hence where a horse-dealer bought a horse with a warranty on Sunday, he could not sue for breach of warranty (§ 158) In order that the statute may apply, the agreement must be one made in the course of the ordinary business of the tradesman If, however, goods be sold on Sunday, and both parties carry out the agreement, the property in the goods passes to the buyer

§ 110. Where Goods are sold by Improper Weights or Measures.—By the Weights and Measures Acts, in all agreements for work or for the sale of goods by weight or measure, the weights and measures of the imperial standard, or those of the metric system, must be used, otherwise they are not enforceable

§ 111 Where certain Goods are not sold in accordance with Law—Dead game killed in this country can be sold only during a certain time of the year by licensed dealers

Intoxicating liquors can be sold only in licensed premises The retailer of spirituous liquors is prohibited from taking any pledge for the payment of the price, and as a rule the retailer of all kinds of intoxicants is unable to sue for the price

Coal must be sold by the weight, and a weight ticket be delivered to the buyer with any quantity over two hundredweight, otherwise a penalty is incurred, and the seller cannot recover the price Bread, except fancy bread, must also be sold by weight if the purchaser so desire

§ 112 Where the Agreement is in restraint of Trade —As a general principle a trader is entitled to carry on a lawful business at his own discretion and in his own way, and any agreement to the contrary is void Hence where a number of manufacturers agreed to regulate the wages and hours of work of their employees, and to manage their establishments in accordance with the views of the majority, it was held that this agreement, being in restraint of trade in so far as it deprived each one from controlling his own business, was not enforceable.

It is, however, not unlawful for a number of trades to agree to share the trade between them in such a way as to prevent competition, at least so long as there are no unreasonable restraints placed upon the parties

The law permits agreements to be entered into that appear to be in a partial restraint of trade, on the ground that ultimately trade will be benefited The chief agreements of this kind relate to the sale of a business

After the sale of the goodwill of a business the seller, in the absence of any contract to the contrary, is free to carry on a similar trade, and to solicit his former customers in the usual way of business In order to prevent the seller taking this course, it is usual to insert in the document by which the sale is effected a stipulation or contract restraining the seller from trading within such limits as regards place and time as are reasonably necessary for the protection of the business the buyer has acquired

A restraint unlimited as regards space is generally, though not necessarily, unreasonable For example, a covenant by a brewer not to carry on the business of a brewer anywhere else was held unreasonable On the other hand, covenants by a milkman not to set up in business within five miles for two years, and of a butcher not to carry on the same trade within five miles, were held reasonable The nature of the trade is an important element in determining what is reasonable

A restraint reasonably limited as to space may, in some cases, be unlimited as to time, inasmuch as this may be necessary to secure him the full enjoyment of that which he

has bought. Hence the seller may agree not to carry on a similar business in a certain district during his life

And an agreement not to solicit or do business with persons who are customers of the seller at the time when the business is sold is generally reasonable

Similar principles are applied to agreements by which a retiring partner binds himself not to compete with the firm, or by which a servant or agent undertakes not to compete with his employer after the period of employment has ended

§ 113. Where the Agreement is a Fraud on Creditors —All agreements made for the purpose of defrauding third parties are void If therefore a debtor who is insolvent enters into an arrangement with his creditors that they will accept part payment of all debts due in full discharge of such debts, he is not allowed to favour one creditor at the expense of the others A creditor who stipulates with the debtor for a preference in favour of himself cannot enforce such agreement

Any agreement on the part of the creditors of a bankrupt, or of the bankrupt himself, tending to interfere with the just application of the bankruptcy law is illegal and void An agreement by a creditor not to oppose the bankrupt's discharge, or an agreement interfering with the equal distribution of the assets, is void So too is an agreement buying the vote of a creditor in the interests of the bankrupt

§ 114. Trading with the Enemy —Whilst this country is at war it is illegal to trade with persons residing or carrying on business in the country of the enemy, as to do so tends to defeat our policy of destroying the enemy's commerce Hence contracts entered into for this purpose during the war are illegal and cannot be enforced Contracts entered into before the war began are dissolved or suspended during the continuance of the war.

CHAPTER V

POSSIBILITY OF PERFORMANCE

§ 115. Possibility at Time of Contracting — An agreement, in order to be enforceable at law, must be possible of performance As we are at present concerned with the formation of contracts, the possibility of performance to be considered is that which exists at the time the agreement is made If such possibility exist then there is *prima facie* a good contract

At a subsequent time events may occur that render it impossible for one or other of the parties to fulfil the obligation undertaken, and the effect of such events on the legal position of the parties requires to be examined.

§ 116 Kinds of Impossibility.—Three kinds of impossibility may be specified .—

1. Physical impossibility. that is to say, impossibility inherent in the nature of the act promised, as, for instance, where a man agrees with another to jump over the moon
2. Legal impossibility that is to say, where the act promised is impossible in law
3. Actual impossibility that is to say, where the act promised becomes impossible owing to circumstances

§ 117 Absolute Impossibility —If an agreement is impossible in itself, it is void, as the parties to it cannot be supposed to have entered into an absurd agreement The question of what is or is not impossible in itself depends

largely on the progress of knowledge What is apparently impossible at one time, becomes possible at a later stage of the earth's history. For instance, a contract to make a machine to fly across the ocean was suggested in earlier editions of this work as an example of an impossible contract Now it can no longer be said to be physically impossible to make such a machine

§ 118 **Legal Impossibility.**—Where the performance of an agreement is legally impossible there is no valid contract Every person is supposed to know the law, and the parties to the agreement are taken to have been aware that in law it could not be carried out For instance, if A professes to discharge B from a debt due to C without having any authority from C to do so, the discharge is void, as a valid discharge for a debt can be given only by the debtor or his agent.

§ 119 **Actual Impossibility.**—Where the act to be done is not impossible in itself, and is not impossible in law, it may become impossible in fact, owing to particular circumstances occurring subsequently As a general rule the agreement is valid and the party who has undertaken the performance is liable. A few examples will illustrate the principle Where a ship was to be loaded with usual despatch, and the loading was delayed by the occurrence of a frost, the party loading was held liable for the delay Where a builder undertook to erect a building within a certain time in accordance with plans to be furnished, and it turned out that the plans were such that the buildings could not be erected within the time prescribed, the builder was held liable In both these cases the parties might have protected themselves by the insertion of proper stipulations in the agreement Unexpected difficulties therefore do not serve as an excuse for non-performance of the terms of an agreement

There are certain exceptions to the principle, but they will be referred to under the head of Performance and Discharge of Agreements (§ 140).

CHAPTER VI

EFFECTS OF MISTAKE, MISREPRESENTATION, OR FRAUD

§ 120. **Reality of Consent.**—A contract which on the face of it is for a legal and possible object, possesses the proper form or consideration, and is made between parties capable of contracting, may, however, have no legal effect or a limited legal effect if it appear that there was no real agreement This may happen in three ways (1) where there was a "mistake," the parties meaning different things, (2) where there was innocent "misrepresentation" by one of the parties that induced the other to contract, and (3) where there was "fraud," *i e* an intentional misrepresentation

§ 121. **Mistake.**—As a general rule one party to a contract is not allowed to avoid it by alleging that he made a "mistake" The word "mistake" may, however, be used in various senses It may mean a mistake as to expectations A buys goods thinking the market is going to rise, when in fact it falls It may mean a mistake as to the utility of the article for a particular purpose, as, for instance, where a person buys a stove which he finds too small for heating purposes Or it may mean mistake in wording the offer or the acceptance, *e g* where A orders 100 tons when he only meant 10 tons Other uses of the word might easily be given We are, however, concerned with a technical use of the term to denote certain circumstances that are recognised by the courts as indicating a want of that real consent that is essential to every contract. These circumstances may be divided into five classes —

1. Where the contract relates to a thing believed by both parties to exist when it has ceased to exist
2. Where one party contracts with another person believing him to be a third party.
3. Where one party, not being negligent, is mistaken as to the real nature of the contract
4. Where there is a mutual mistake as to the identity of the thing sold
5. Where one party is mistaken as to the nature of the promise given, and such mistake is known to the other party

§ 122. (1) **Mistake as to the Existence of the Subject Matter.**—When a cargo at sea is sold, the parties, not knowing whether it is afloat or not, contract on the supposition that the cargo is afloat If it eventually turns out that the vessel and cargo had been wrecked and lost at the moment the contract was made, the contract is not binding, and the loss falls on the seller and not upon the buyer So too where a cargo of corn supposed to be on a voyage to England was sold, when in fact it had become so heated that it had already been sold at Tunis, the court held the contract void on the ground that it implied that the corn was in existence as such, and that it was capable of delivery

It would probably be more correct to classify all these cases under failure of an implied condition that the thing sold is in existence and belongs to the vendor.

It is important to remember that such an implied condition is only imported into contracts of a certain type, *i e* when the parties are to be taken as contemplating an existing thing belonging to the vendor. There is no rule of law to prohibit A from selling to B. that which does not belong to A. Stock Exchange dealings take place daily in stocks and shares that do not belong to the vendor, and such dealings are valid Non-existing property may be bought and sold if there is a possibility of its coming into existence, and the parties are aware of its non-existence For example, A may sell B. a crop to be raised on a certain field

§ 123. (2) **Mistake as to Party.**—When A. enters into

an agreement with B thinking B is C, there is no real contract There is none between A and C, for C never agreed, and there is none between A and B, for A never agreed to contract with B Mistakes of this sort, apart from fraud, are not common A was accustomed to buy goods from B an order for goods from A directed to B came into C.'s hands, who had bought B.'s business C executed the order without informing A of the change in the proprietorship of the business It was held that A was not obliged to pay for the goods, as there was no contract between A and C

If A. by imitating the signature of B obtains goods from C, the property in the goods will not pass to A., as there is no real contract of sale between A and C. In this case C thinks he is contracting with B

§ 124. (3) **Mistake as to the Nature of the Contract** — If a blind man or a man who cannot read has a written contract falsely read out to him, so that the contract as read is entirely different from the contract as written, and he afterwards signs the contract, it is not binding on him Under such circumstances "the mind of the signer did not accompany the signature" Hence where a very old man signed a bill of exchange (§ 252), being told that it was a guarantee (§ 202), and the bill was endorsed over to a party who sued him upon it, it was held that the amount could not be recovered against him And where an illiterate man executed a deed releasing "all claims," which was represented to him as a deed releasing "arrears of rent" only, it was held that the deed was void

In order that the contract may be avoided in these cases, it is necessary that there should be an absence of negligence He who signs a written document without informing himself of the contents when he is able so to do, is negligent, and will be bound by his document.

§ 125. (4) **Mistake as to the Identity of the Thing sold.**—If A. intends to sell one thing, and B to buy another, there is an absence of that common intent that is the essence of every agreement Cases occur where different things are described by the same name, and it is quite possible

for the parties to agree upon a contract thinking they mean the same subject matter when in fact they do not A purchased from B a cargo of cotton "to arrive *ex* 'Peerless' from Bombay" it so happened that there were two ships sailing from Bombay named 'Peerless,' and A meant one vessel and B. the other. It was held that there was no contract.

§ 126. (5) **Mistake of One Party known to the Other.**—In contracts of sale the law leaves the buyer to use his own judgment, and if he makes any mistake as to the quality of the thing sold, the loss falls upon himself (§ 157) To this rule there are, as we shall see (§ 158), certain exceptions, for example, where the vendor warrants the quality of the thing sold The general rule is that the passive acquiescence of the seller in the self deception of the buyer does not entitle the latter to avoid the contract If therefore A buys from B a length of cloth believing it to be of better quality than it really is, A, although he knows B is labouring under a mistake, is not bound to inform him, and the contract is good But it is quite another matter if the seller has done anything to induce the buyer's mistake. In that case the seller is bound to correct the mistake, and his not doing so amounts to misrepresentation which avoids the contract And of course the buyer may protect himself by asking the seller to warrant the quality of the goods Moreover in certain contracts, such as insurance (§ 175), the fullest disclosure of all material facts is required, and such contracts may be avoided if there is any non-disclosure or acquiescence in the mistake of the other party

§ 127. **Innocent Misrepresentation.**—Previous to or at the time of entering into a contract representations may be made by either party to the other with the object of inducing him to agree to the terms proposed A vendor of goods, for instance, may represent them as being the manufacture of a particular firm, or as possessing certain qualities Actual misrepresentation is forbidden, and a contract is liable to be set aside where a misrepresentation is made, even though the person making it believes he is speaking the truth. In order that a misrepresentation may avoid

the contract, it must (1) be of fact and not of law, (2) be made by a party to the contract, and (3) have induced the contract

1 The misrepresentation must be of fact.

Every one is supposed to know the law, and therefore the courts will not avoid a contract where one party has entered into it on the faith of a representation of its legal effects which was untrue There are exceptions to this rule, as, for example, where such an advantage has been taken by one party of the other as to amount to a fraud

The representation must not be a mere opinion Hence statements of "belief" are not representations of fact But a statement as to a person's intention or belief may be a misrepresentation of fact If a person states that he believes something or intends to do something when in fact he has no such belief or no such intention, this is as much a misstatement of fact as if he states that he has a stomach-ache when in fact he has not

2 The misrepresentation must be made by a party to the contract

If A contracts with B on the faith of representations made by C, he cannot avoid the contract. But if B is the agent of C, the question arises, Are principals responsible for the misrepresentations of their agents? As a rule a principal is only liable for the act of his agent if it is within the scope of his authority (§ 46), and hence if the misrepresentation was within the agent's authority, the contract of the principal is void Directors are agents of the company, and if they induce persons to contract with the company by misrepresentations, such contracts are liable to be avoided

3 The misrepresentation must have induced the contract.

A party to a contract cannot avoid a contract on the ground of misrepresentation, if such misrepresentation did not induce him to make the contract The misrepresentation, in other words, must relate to a material fact, and a fact is said to be material when it would affect the judgment of a reasonable man, acting on the principles which

men follow in the kind of business to which the contract relates It is no reply to an alleged misrepresentation to say that the other party might have ascertained the truth—the making of the representation tends to put the other party off his guard Nor is it any reply to prove that the party making it believed in its truth. There is no duty, in the cases of which we are speaking, of making, any representations whatever, and he who makes them and thereby induces a party to enter into a contract with him cannot enforce such contract

§ 128 **Fraud**—A misrepresentation will amount to fraud where the party making it (1) knows that it is untrue, or (2) makes it recklessly, not caring whether it be true or false

Actual knowledge that the representation is false is not necessary to constitute fraud It is enough if the statement is made recklessly, without caring whether it is true or false But it is not sufficient that the false statement be made carelessly, it must be made recklessly An honest belief in the truth of the statement excludes the idea of fraud.

For example, where the directors of a company stated in a prospectus that the company had the right to use steam power, honestly believing this to be true, when in fact the company had no such power, it was held that there was no fraud

The distinction between misrepresentation and fraud lies in this, that in fraud there is a wilful misrepresentation Fraud involves misrepresentation, but requires in addition either a knowledge that the statement is untrue, or a reckless state of mind as to its truth or falsehood

§ 129 **Remedies in case of Misrepresentation or Fraud**

1. Contracts induced by misrepresentation or fraud are not void but voidable, *i e* the party injured may elect to uphold the contract or to avoid it.

But an innocent misrepresentation not amounting to fraud or to a warranty (§ 158) does not give rise to an action for damages. It is a ground for avoiding the contract, and no more.

2. In the case of fraud an action may be brought for deceit

Fraud is a wrong giving rise to an action for damages, apart from any damages that can be claimed for any loss arising under the contract

§ 130. **Directors' Liability for Prospectuses.**—When a person upon the faith of statements in a prospectus takes shares in a company, he has two remedies in the event of such statements being untrue (1) The contract to take the shares having been induced by misrepresentation is voidable at his option, and he can get the contract rescinded and have his name removed from the register of shareholders (2) He has also a remedy against the directors personally Every person who is a director of the company at the time of the issue of the prospectus, and every person whose name appears in the prospectus with his authority as a director or proposed director, is made liable by statute to pay compensation to persons subscribing for shares on the faith of the prospectus for damage they have sustained by reason of any untrue statement in the prospectus, unless he believed and had reasonable grounds for believing such statement to be true, or unless such statement was made on the authority of an expert or a public official document Thus a director may be personally liable for an untrue statement although not made fraudulently The law requires a number of facts relating to the company to be specifically stated in every prospectus

CHAPTER VII

THE ASSIGNMENT OF CONTRACTS

§ 131. Introductory.—An unperformed contract gives rise to certain rights and duties. The rights belong to, and the duties are binding on, the parties to the contract. A person who is not a party to the contract cannot enforce the rights or be compelled to undertake the duties. It may, however, happen that one of the parties may desire to transfer his rights or his liabilities to another person, and we have to examine how far the law will recognise such transfer. A distinction must be drawn between rights and duties or liabilities.

§ 132. Liabilities cannot be assigned.—The law does not permit a person who has promised to do anything under a contract to transfer such duty to another person. If A contracts with B that he, B, shall manufacture and supply certain goods, B is not allowed to transfer the duty of fulfilling the contract to C. A. may have been induced to make the contract by his reliance on the credit and character of B. In any case the law assumes that A contracted with B, and with B alone.

A liability, however, may be assigned with the consent of the party entitled to call for performance. This practically amounts to a rescission of the contract with one person and the making of a new contract with another.

§ 133. Assignment of Rights.—Formerly it was a rule that rights under a contract were not assignable, but partly by the decisions of the courts and partly through the

operation of statutes, such rights can now be assigned. Special provision has been made for assigning rights under certain contracts, *e g* in the case of policies of insurance and shares in companies In all these cases the provisions of the statute must be observed

The right to receive money under a bill of exchange or a promissory note may be transferred by delivery of the bill or note if it is payable to bearer, and by endorsement and delivery if it is payable to order (§ 260). So, too, may the contract contained in a bill of lading (§ 240)

All debts, *i e* rights to receive money, may be assigned by writing signed by the assignor, provided the assignment be absolute The assignee must give to the person liable to pay express notice in writing of the assignment. The assignee takes subject to any "equities," *i e* claims to which the debt was subject previous to assignment.

§ 134 **Assignment of Rights and Liabilities by Operation of Law**—We have seen that a liability under a contract cannot be assigned to another by the party upon whom the liability is cast by the contract What an individual cannot do, the law may do, and in some cases does For instance, the purchaser of a lease is by law bound to pay the rent and to discharge other liabilities imposed by the lease on the original lessee Death often operates as a transfer of both rights and liabilities For instance, the personal representatives (§ 2) of a deceased man take all his personal property; all liabilities attached to such property pass to them as well as the benefit of all rights of action On bankruptcy all rights of action belonging to the bankrupt (except those of a purely personal nature, such as a right of action for damages for libel or personal injuries) pass to the trustee

CHAPTER VIII

PERFORMANCE, BREACH, AND DISCHARGE OF CONTRACTS

§ 135. Duty of Performance.—The parties to a contract are bound to carry out their respective promises. The performance must be a *bona-fide* performance, and not a compliance with the mere letter of the agreement. Where no time is fixed, performance must be within a reasonable time. In some cases the performance by one party is made to depend on something to be done previously by the other, where this happens, performance is not due until the act agreed upon has been performed

§ 136. Payment — When a sum of money has to be paid, the payment, unless the parties otherwise agree, should be made in legal-tender money (§ 166) It is in most cases the duty of the debtor to seek out the creditor, and he is not entitled to defer payment on the ground that no demand has been made A bill or note is often taken in payment of a debt, but as a rule this is to be regarded as merely conditional payment, so that if the money be not paid when the bill or note is due, the creditor may still sue on the original contract But if the creditor has taken the bill or note in discharge of the debt, then he has to rely on the rights of action given by the bill, and the original contract is at end

§ 137. Tender.—In the case of a sale of goods, a tender of the price or of the goods is a good defence to an action brought for the price or for not delivering the goods In the case of a tender of goods, the tender should be unconditional, and be made at the proper time and place,

and the person to whom the tender is made should have a reasonable opportunity of examining the goods.

In the case of money, such a sum should be offered as will enable the creditor to take exactly what is due without giving change (§ 166)

Breach of Contract

§ 138 **Effect of Breach.**—A breach of contract by one party gives the other party a right of action for damages Sometimes it has the result also of releasing the other party from his obligation to perform the contract. A breach by one party does not, however, necessarily release the other party. Whether or not it does so depends partly on the terms of the contract itself, partly on the extent of the breach For instance, if A contracts with B to deliver goods by instalments at certain dates, the fact that he is late with one instalment, though it is a breach of the contract, does not, unless otherwise agreed release B from his obligation to accept and pay for other instalments But if A time after time disregards his obligation so as to show that he has no intention of keeping to his bargain, B may refuse to be any longer bound by the contract Such conduct on the part of A amounts to a renunciation of the contract. There are three cases in which a breach by one party releases the other

§ 139. (1) **Renunciation**—When one party breaks his contract in such a way as to show that he does not intend to be bound by it, or gives the other notice that he will not carry out a contract, the latter may treat the contract as at an end, and bring an action for damages For instance, if A. engage B as a servant from the 1st June, and before the 1st of June A. writes to B that he will not require his services, B may bring an action for damages at once against A. In order that a renunciation should amount to a discharge of a contract, it is necessary (1) that the renunciation should be of the whole contract, and (2) that the renunciation should be accepted as a discharge The other party is not bound to accept a renunciation, and

if he afterwards insists on treating the contract as still binding, it continues so for all purposes

§ 140. (2) Impossibility.—If one of the parties to a contract by his own act renders performance by him impossible, the other party is excused performance, and may at once bring an action for damages For example, if A. gives B. an option (which B accepts) to purchase an article within a certain time, but before the option is exercised sells it to some one else, the contract is at an end, and B may bring an action for damages without tendering the price

§ 141. (3) Failure to Perform.—Where the performance of a promise forms the consideration for the performance of another promise, failure to perform the one excuses the performance of the other For example, when goods are sold and no time is fixed for payment, the buyer must be ready to pay and the seller must be ready to deliver at one and the same time But if the seller is to deliver at a certain date and the buyer is to pay at a later date, the failure of the seller to deliver discharges the liability of the buyer to pay

§ 142 Remedies for Breach.—We have seen that in many cases of breach of contract the party injured is discharged from performance of his promise Apart from this, he is entitled to bring an action for damages The amount of damages recovered is supposed to represent the loss sustained so far as it can be reasonably supposed to have been in the contemplation of the parties at the time of making the contract as a probable result of the breath But damages which could not reasonably have been foreseen as likely to flow from the breach cannot be recovered. So where A orders a new shaft for his mill from B, and delivers the old one to C, a carrier, to be taken to B as a pattern, C. delays delivery of the shaft to B, in consequence of which the new shaft is delayed and A.'s mill is prevented from working, and A loses the profits of his mill—A cannot recover from C for the loss of profits, as C did not know and could not reasonably be expected to have foreseen that the result of his delay would be that A.'s mill would be stopped.

Instead of awarding damages, the courts may order the defaulting party to perform the contract This course is usually adopted in regard to sales of land, but in the case of the sale of goods the courts consider that damages are a more appropriate remedy and specific performance is only decreed when the articles sold cannot, on account of their intrinsic qualities, be represented adequately by damages.

DISCHARGE

§ 143. Discharge of Contract.—A contract may be discharged in the following ways —

1 By consent The parties may agree before performance that the contract shall be no longer binding If the contract is made under seal, the discharge must also be under seal The discharge may take the form of the substitution of a new contract for the old one

2 By fulfilment of a proviso for discharge The original agreement may contain a clause to the effect that under certain circumstances it is to be at an end

3 By operation of law The alteration of a written contract by one party without the consent of the other will under certain circumstances operate as a discharge, and some contracts, such as those for personal services, are put an end to by the death of one of the parties

4 Performance, as we have seen, puts an end to the contract

5 Breach of contract, as we have also seen, often operates as a discharge

§ 144 Authorities on Contracts —Messrs Pease and Latter's Summary of the Law of Contract is specially designed for students The work of Sir William Anson and Sir F Pollock's treatise on Contracts are more advanced A Digest of the Law of Contract, by Mr Leake, is an excellent work, whilst works such as Addison on Contract discuss all forms of contracts

PART III

THE LEADING COMMERCIAL CONTRACTS

CHAPTER I

SALE OF GOODS

§ 145. Introductory.—The Law of Sale of Goods is now wholly contained in the Sale of Goods Act 1893, which sets out in the form of a code the law that had previously been established mostly by the decisions of the courts

That Act in section 1 defines a contract of sale of goods as follows:—

1. A contract of sale of goods is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration called the price
2. A contract of sale may be absolute or conditional.
3. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called *a sale*, but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called *an agreement to sell*
4. An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled, subject to which the property in the goods is transferred

§ 146. A Sale and an Agreement for Sale.—It is important to note the distinction drawn in the above definition between a "sale," and an "agreement to sell" A contract, as a rule, leaves one or both of the parties to it under an obligation or a number of obligations to do or

perform something. For instance, in the wholesale market where transactions are carried out on a large scale by means of credit, a purchase usually leaves the seller under the obligation to deliver the goods, and the buyer under the obligation to pay the price at the time and place agreed upon Here at the moment of time the contract is made performance is on both sides postponed to a future date, and the distinction between the making of the contract and its performance is very marked The contract is an "agreement to sell", but in the retail market, where articles are often sold for cash and delivery is at once made, the formation of the contract and its performance take place practically at the same moment For instance, a person enters a shop, purchases a pound of tea, pays for it and takes it away here the contract is performed at the same time as it is entered into The contract is a "sale" The importance of the distinction between a "sale" and an "agreement to sell" lies in the fact that the former does, and the latter does not, transfer the property from the vendor to the buyer In a "sale" the property passes at once, in an "agreement for sale" the goods remain the property of the vendor until the time for delivery has arrived, or the conditions subject to which the property is to pass to the purchaser are fulfilled

§ 147. The Price —The consideration given by the buyer to the seller is called "price," and price always implies money If goods be given without any consideration, there is a "gift", if goods be given in exchange for goods, there is a "barter" As a rule, the price is fixed by the contract or by the course of dealing between the parties, but the parties may leave it to subsequent arrangement,—a course not often adopted, as it is likely to lead to litigation

It is not unusual in certain cases for the parties where they cannot fix the price to leave it to be fixed in an agreed manner Such an arrangement is legal. The usual manner adopted is to refer the price to valuers, and the price so fixed is as much a part of the contract as if it had been inserted in it

Where none of the above methods are adopted for fixing

the price, the buyer must pay a reasonable price, *i e*, in the last resort, such a price as a jury may in all the circumstances of the case consider reasonable An example may be given of a contract of sale where no price was fixed A ordered B to build a new carriage with certain appointments, the whole to be ready by a certain date The carriage was built, but on B sending in his bill for £480, A refused to take the carriage or to pay for it, alleging amongst other things that the omission of the price from the order invalidated the contract The court held the contract was good, inasmuch as where the price was left uncertain, the law implied that a reasonable price would be paid

§ 148 The Form of the Contract of Sale —Contracts for the sale of goods which are not of the value of £10 or upwards, may (unless made by corporations, as to which see §§ 94, 95) be made in writing (with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties

Until the reign of Charles II, the same rule applied to all contracts for the sale of goods, but s 17 of the Statute of Frauds of that reign contained special requirements for agreements for the sale of goods of the value of £10 or upwards That section was repealed by the Sale of Goods Act 1893, but was in substance re-enacted by s 4 of the last-named Act

§ 149 Goods of the Value of £10 and upwards — It is enacted by s 4 of the Sale of Goods Act 1893, that "a contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless

(*a*) The buyer shall accept part of the goods so sold, and actually receive the same, or

(*b*) Give something in earnest to bind the contract, or in part payment, or unless

(*c*) Some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf"

Disregard of the above conditions does not make a contract void, it simply renders it unenforceable by action It follows then that the contract is good, and all the legal

consequences follow, so that the property passes to the buyer, if the contract is for the sale of specific goods If the buyer refuses to fulfil any of the conditions which would make the contract enforceable against him, the seller may call on him to pay, and if he refuses to do so, the seller may treat the contract as rescinded

§ 150. (*a*) **Acceptance and Receipt**—The buyer must not merely *accept* part of the goods, but must also *receive* them, and the contract will not be good unless he does both.

Acceptance—The same section defines what is meant by an *acceptance* "There is an acceptance of the goods *within the meaning of this section* when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not" It must be borne in mind that this acceptance only renders writing unnecessary, it does not amount to an acceptance which will preclude an objection that the goods are, for example, not up to sample So, where a person bought wheat by sample and failed to comply with this section as regards writing, but opened the sacks and compared his sample with the wheat in the sacks, and immediately gave notice to the seller that it was not up to sample, it was held that by so acting he had accepted the wheat within the meaning of this section, though it still left open the defence that it was not up to sample.

Receipt—As a general rule an actual receipt takes place when there is such a delivery of the goods into the control of the buyer as divests the seller of his lien thereon So, where there is delivery to the buyer himself or to a common carrier, or to an agent of the buyer, there is an actual receipt by him If the seller still remains in possession of the goods, as, for instance, where a livery stable-keeper sells a horse, but keeps it at livery for the buyer, receipt takes place when the seller changes the character of his possession If the goods are already in the buyer's possession, as, for instance, where the borrower of a horse subsequently purchases it, receipt takes place when the buyer does any act inconsistent with the character of his former possession.

If the goods are in possession of a third party, as, for instance, where the goods are stored in a repository, receipt takes place when the buyer, the seller, and the third party agree together that the third party shall cease to hold the goods for the seller, and shall hold them for the buyer

§ 151. (*b*) **Earnest or Part Payment** —"Earnest" means money or other article given by the buyer to the seller, and accepted by the latter as indicative of his assent to the sale, or as consideration for the seller's forbearance to sell the thing to any one else The giving of earnest is unusual in commercial transactions, but in some country fairs a shilling or other coin is given as earnest in the sale of cattle In one reported case, the owner of a horse sent his servant to a fair to sell it, an offer of £45 was made, and the vendor's servant, taking a shilling in his hand, drew the edge of it across the hand of the purchaser, and then replaced the shilling in his own pocket, a proceeding called by the witnesses "striking the bargain", it was held there was no "giving of earnest" within the meaning of the Statute of Frauds

"Part Payment" means payment of part of the price, either in money or in anything that is accepted in part satisfaction of the price

§ 152. (*c*) **Memorandum or Note in Writing.**—The third method of making a valid contract for the sale of goods of the value of £10 and upwards is by some note or memorandum in writing of the bargain, signed by the parties to be charged, or their agents

Two points require consideration—

1. The form of the memorandum in writing.
2. How and by whom it should be signed

§ 153. **The Form of the Memorandum** —The memorandum need not be on one piece of paper, it may be contained in several pieces written at different times, provided the one that is signed makes such reference to the other papers as will enable the court to construe them all as one document A series of letters between the vendor and the purchaser is an excellent example of a memorandum contained in several pieces of paper

It is, however, essential that the evidence of the connection of the different writings should appear from the documents themselves, as oral evidence is not generally admissible to connect a signed paper with others unsigned The various documents must so read together that all the terms of the contract can be gathered from them without the assistance of oral evidence

§ 154. What the Memorandum ought to contain — Firstly, it must designate by name or description the parties between whom the agreement is made

Without such name or description it is impossible to say who are the parties to the bargain, and the writing is therefore incomplete, as it contains only part of the contract. When, therefore, the agent of the purchaser wrote down in a memorandum book the terms of a sale as follows "Bought of A 20 puncheons of treacle, £37 10s, to be delivered by the 10th December," and A signed the memorandum, it was held that this was insufficient, as it did not show who was the purchaser

The memorandum ought always, as a matter of precaution, to contain the names of both the vendor and the purchaser as such But if instead of the name a description of either party sufficient to identify him be given, that will be sufficient For instance, the name of a partnership is regarded as sufficiently describing the members of the firm who compose it

Secondly, the terms of the contract.

The memorandum should state what is sold and the quantity sold, the price, if a price has been fixed, the mode of payment, if this has been arranged, as well as the other terms and conditions agreed upon In short, the memorandum should show the whole bargain As a rule, when the terms of a sale are reduced to writing, and signed by one party, there is a presumption that all the terms have been embodied in the memorandum, and as Lord Blackburn points out, "It is a difficult thing for a party to prove that a written admission signed by himself does not contain the whole truth The jury would properly be very unwilling to find that the writing did not contain the whole agreement,

unless there was some good reason given to explain the inaccuracy."[1]

Thirdly, the signature of the party to be charged.

It has long been settled that the only signature required is that of the party against whom it is sought to enforce the contract If the vendor has to bring an action for the price, he must produce a memorandum in writing of the terms of the contract signed by the purchaser if the purchaser has to sue for the articles sold, he must produce a memorandum, signed by the vendor

It follows from this, that if A. offer B in writing (*e g* by letter) to sell him a certain quantity of goods at a given price, and B accepts the offer *orally*, B can, if necessary, sue A, inasmuch as there is a memorandum signed by A., but A. could not successfully sue B, as there is no memorandum signed by B A vendor should therefore always secure the signature of the purchaser, and the purchaser that of the vendor.

The signature need not be the actual subscription of the name a mark intended as a signature is sufficient A mere description is not enough, and it is doubtful if the use of initials amounts to signature

The signature may be in print, and as the statute does not specifically require the signature to be at the end of the memorandum, it may be at the beginning or in the middle If, however, the alleged signature is not at the end of the document, the question arises, with what intention was the name inserted? If it is introduced merely incidentally, that is not sufficient The name "must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to every part of the instrument"

§ 155. **Signature by an Agent**—The signature of a party to the contract may be made by an "agent in that behalf"

The agent must be a third party, inasmuch as it has been held that one of the parties cannot act as agent for the other in order to sign a contract of sale

The authority given to the agent to sign need not be in

[1] Blackburn on Sale, 2nd ed p 58

writing, and the fact of agency may be established in the same way as in other cases of agency (§ 43)

An auctioneer is an agent with a power of sale from the vendor, and therefore has an implied authority to sign the contract of sale embodied in the condition of sale on his behalf The auctioneer has, however, no authority from the highest bidder to make a contract for him, but the moment the lot is knocked down, the highest bidder becomes the purchaser, and in law (provided the sale is a public one) he is held to authorise the auctioneer to sign the contract on his behalf The auctioneer, by entering the purchaser's name and the price opposite each lot in the catalogue, makes the contracts binding on the purchasers

An auctioneer's clerk is not the agent of the parties, he is the agent of the auctioneer, and he can only sign on behalf of the parties where he is specially authorised so to do

A broker for sale is a person whose trade is to "find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them"[1] He is authorised to sign a memorandum of the terms of the contract so as to make it binding on each

When a broker succeeds in effecting a sale, he usually enters the terms in his broker's book and adds his signature This signed entry constitutes the contract between the parties, and is binding on both The broker, as such, having authority to make a memorandum of the contract between buyer and seller, a signed entry in his book is a sufficient memorandum to satisfy the requirements of the section

As a rule a broker prepares two copies of the entry and signs them One is called the "sold note," and is sent to the vendor In substance it takes this form "Sold for A. B to C D." The following is an example —

"To Messrs A. B —Sold for your account to Messrs C and D the following parcels of Spanish wool (a few bags more or less) of each mark, viz (*specifying them and the*

[1] Blackburn on Sale, 2nd ed p 78

rates of price) customary tare and allowance. To be paid for by acceptances at two, four, six, and eight months. —Signed, M , *Broker*."

The other note is called the "bought note." In substance it takes this form. "Bought for C D of A." The following is an example :—

"Bought for Messrs C. D of Messrs A B from 80 to 100 tons of palm oil, of merchantable quality, free from dirt and water, at £26 per ton, payable per cash, etc. The above oil warranted to arrive on or before the 30th June (current), *ex* 'Premier,' Fullerton, Cape Coast Customary allowances —Signed, T W , *Broker*"

The party receiving and keeping either a bought or a sold note is held to know that the person signing it is acting as his broker, and to authorise him to do so It is the better opinion that the bought and sold notes do not constitute the contract that is contained in the signed entry in the broker's books, but the value of the bought and sold notes consists in this, that in the absence of any entry in the broker's books, or in the case of the entry being unsigned, the bought and sold notes, if they agree, and if they contain the names of the parties, and all the other terms of the bargain, are sufficient to satisfy the section Indeed, either note alone will suffice if there be no variance between it and the other note

Difficult questions arise where either of the two notes differs from the other, or from the signed entry The rules applicable in such cases will be found in the works of Lord Blackburn and Mr Benjamin on the sale of goods [1]

§ 156 Variations of a Written Contract —A contract which has been reduced to writing may generally be altered or rescinded by an oral agreement But in the case of contracts of sale which are within s 4 of the Sale of Goods Act, if the original contract is in writing no alteration can be effectively made by oral agreement If it is desired to alter the terms agreed upon, there must be some note or memorandum in writing of such alteration.

[1] See Benjamin on Sale, 4th ed p 268, where the leading rules are summarised.

In some cases an oral alteration has been held to amount to a rescission of the original contract and the substitution of a new one for it, inasmuch as there is nothing in the section to prevent a written contract from being wholly rescinded by a verbal agreement

§ 157. Caveat Emptor.—As a general rule, on a sale of goods, the buyer takes all risk as to quality, fitness, or condition of the goods The buyer is supposed to examine the goods before the purchase, and he cannot afterwards complain that defects were not pointed out. "The buyer is always anxious to buy as cheaply as he can, and is sufficiently prone to find imaginary faults in order to get a good bargain, and the vendor is equally at liberty to praise his merchandise in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspection, and no means are used for hiding the defects If the buyer is unwilling to bargain on these terms, he can protect himself against his own want of care or skill by requiring a warranty from the vendor of any matters the risk of which he is unwilling to take upon himself" [1]

§ 158 Express Warranties and Conditions.—A contract of sale may be subject to conditions agreed to by the parties, and may be accompanied by one or more warranties, expressed or implied, given by the seller to the buyer

A warranty is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated

A condition is a stipulation in a contract of sale, the breach of which may give rise to a right to treat the contract as repudiated Whether any particular stipulation is a condition or a warranty depends in each case upon the construction of the contract, and no general rule of guidance can be safely laid down, except that a stipulation amounts to a condition only if it is a statement or promise on the truth of which the existence of the contract depends Thus a sale of turnip seeds as "Skirving's swedes" is not satisfied

[1] Benjamin on Sale, 4th ed p 404

§ 159 **Implied Warranties and Conditions.**—In contracts of sale there are certain warranties and conditions which are implied by law, although nothing is said about them by the parties These implied warranties and conditions are summarised in the Sale of Goods Act as follows —

A *Implied undertaking as to title, etc*—In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

1. An implied *condition* on the part of the seller that in the case of a sale he has the right to sell the goods, and, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass
2. An implied *warranty* that the buyer shall have and enjoy quiet possession of the goods
3. An implied *warranty* that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made

B *Implied conditions as to quality or fitness*

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

An examination of this rule shows that three things are necessary (*a*) The buyer must make known to the seller the particular purpose for which the goods are required, (*b*) he must show that he relies on the seller's skill or judgment, (*c*) the goods must be goods of a description which it is in the course of the seller's business to supply.

Unless all these three requirements are fulfilled the condition of fitness will not be implied

2 Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality, provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed

Implied warranties or conditions as to quality or fitness for a particular purpose may also be annexed by the usage of a particular trade

In the sale of certain drugs, it is usual to state in the catalogue whether they are sea-damaged or not, and in the absence of a statement that they were sea-damaged, it is always assumed that they are free from such a defect This custom was held to be equivalent to an implied warranty of freedom from sea-damage

These implied warranties are not excluded by express warranties being given upon a contract of sale, unless the express warranties are inconsistent with the implied warranties A seller may always exclude or limit his liability by expressly declining to warrant his goods as fit for any particular purpose or as being of any particular quality

C *Implied warranty on sale of marked goods*—The Merchandise Marks Act 1887 also provides that on the sale or in the contract for the sale of any goods to which a trade mark (§ 22) has been applied there shall be an implied warranty by the seller that the mark is a genuine trade mark and not forged or falsely applied, unless the contrary is expressed in some writing signed by or on behalf of the seller and delivered at the time of the sale or contract to the buyer and accepted by him

D *Implied condition on sale by description* —Where there is a contract for sale of goods by description there is an implied condition that the goods shall correspond with the description

So a contract to sell rice shipped at Madras in March

and April is not fulfilled by delivering rice shipped in February And when the sale is by sample as well as by description the bulk of the goods must correspond with the description as well as with the sample.

E *Implied conditions on sale by sample* —Goods are very commonly sold by sample The seller shows a sample, say of wheat, and the buyer agrees to buy a quantity on the faith of the bulk corresponding with the sample On such a contract for sale there are the following implied conditions —

1. That the bulk shall correspond with the sample in quality
2. That the buyer shall have a reasonable opportunity of comparing the bulk with the sample
3. That the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample

For example, where a manufacturer agreed with a merchant to manufacture cloth according to sample at 18/6 per piece, each piece to weigh 7 lbs, and made and delivered the cloth to the merchant, who examined it and accepted it, but later on found out that the weight of the cloth was made up by the introduction of 15 per cent of china clay, whose presence could not have been discovered by an ordinary examination of either the sample or the bulk of the cloth, the merchant was held to be entitled to recover damages for breach of the condition, which he elected to treat as a breach of warranty

§ 160. **Duty of the Seller to deliver** —The primary duty of a seller of goods is to *deliver* them in accordance with the terms of the contract By *delivery* is meant transfer of the *possession* Such transfer does not require, in order to be effective, the actual physical handing over of the goods · it is sufficient if the buyer be put in control of the goods, as, for example, where the key of the warehouse in which the goods are stored is handed to the buyer When goods are at sea, delivery to the purchaser of the bill of lading for the goods is equivalent to delivery of the goods (§ 210).

Where nothing is said about payment, the law presumes that the delivery and the payment will take place at the same time The seller cannot insist on payment unless he is ready and willing to deliver, and the buyer cannot insist on delivery unless he is ready and willing to pay the price

Unless there is an express or implied contract to that effect the seller is not bound to send or carry the goods to the buyer, it is sufficient if he affords the buyer reasonable facilities for taking possession of them If nothing be said as to the *place* of delivery, it is assumed that the parties contemplate delivery at the seller's place of business, if he have one, and, if not, at his residence; except that if the contract be for the sale of specific goods which, to the knowledge of the parties when the contract is made, are at some other place, then that place is the place of delivery

It sometimes happens that the goods at the time of sale are in the possession of a third party in such a case, delivery is effected when such third person acknowledges to the buyer that he holds the goods on his behalf

In many contracts, the seller undertakes to deliver the goods to the buyer. In such cases, if no time be fixed for delivery, the seller is bound to deliver within a reasonable time What is a "reasonable time" depends on the facts and circumstances of each case

The seller ought to deliver the exact amount of goods ordered, neither more nor less If he delivers more, the buyer may reject the whole quantity, or he may, if he chooses, take the whole at the contract rate, or may accept only the amount included in the contract, and reject the rest If the seller delivers less, the buyer may reject or accept them

The seller is not entitled to deliver the goods mixed with goods of a different description if he does so, the buyer may reject the whole

The buyer is not bound to accept delivery by instalments, unless he has agreed so to do

Where the seller is authorised by the contract to forward the goods to the buyer, delivery to a carrier is equivalent to

delivery to the buyer The seller ought to take the usual precautions for ensuring the safe delivery by the carrier to the buyer If he does not do so and the goods are lost or damaged, the buyer may decline to treat the delivery to the carrier as delivery to himself, or may hold the seller responsible in damages

§ 161. **Imported Goods**—Goods bought abroad for importation are usually bought either *c i f.* or *f o b.* The letters *c i f* mean "costs, insurance, freight," and when goods are bought *c i f* the price covers cost, insurance, and freight, and the bargain is that the seller is to ship the goods and insure them, and either pay the freight or give the purchaser credit for the freight he will have to pay on delivery He then sends to the purchaser the shipping documents, that is, the bill of lading and policy of insurance with an invoice, and his so doing is equivalent to delivering the goods themselves and entitles him to payment By means of the bill of lading the purchaser gets possession of the goods on arrival of the ship (§ 232), and if they are lost or damaged he is protected by the policy of insurance which is assigned to him (§ 178) If the goods are bought *f o b* the seller discharges his obligation by delivering the goods "free on board" the ship, and from that time they are at the risk of the purchaser, who will have to pay the freight, and may, of course, insure them in his own name

§ 162 **Rights of Unpaid Seller against the Goods**—In order to protect a seller of goods who has not been paid, the law gives him certain rights that he can exercise, so long as the goods have not passed into the actual possession of the buyer

These rights are (1) lien, (2) stoppage *in transitu*, and (3) resale

(1) **Lien**—The unpaid seller of goods, if he has not parted with possession of them, is entitled to retain possession until payment or tender of the price in the following cases —

(*a*) Where the goods have been sold without any stipulation as to credit

(*b*) Where the goods have been sold on credit, but the term of credit has expired.

(*c*) Where the buyer becomes insolvent.

The lien will be lost—

(*a*) If the goods be delivered to a carrier for transmission to the buyer, unless the seller has reserved the right of disposal

(*b*) If the buyer or his agent lawfully obtains possession of the goods.

(*c*) If the seller waives his right.

The delivery of part of the goods will not destroy the lien on the remainder, unless such delivery amount to waiver

§ 163 (2) Stoppage in Transitu.—Where the goods are delivered to a carrier for transmission, the seller's lien is gone, but if the buyer becomes insolvent whilst the goods are in transit, the seller may resume possession of them, and may retain them until the payment or tender of the price

Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, for the purpose of transmission to the buyer, but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee

The seller may exercise his right by taking actual possession, or he may give to the carrier or person in actual possession a notice of his claim On receipt of such notice, the carrier or other person in possession must redeliver the goods to, or according to the directions of, the seller.

If before the receipt of any such notice the goods have arrived at their destination and have been delivered to the purchaser or his agent, or if the carrier hold them as warehouseman for the purchaser, and no longer as carrier, the *transitus* and the right of stoppage are at an end

§ 164. (3) Resale —The contract of sale is not rescinded by the seller's exercising his right of lien or stoppage *in transitu*, but in three cases an unpaid seller has a right to resell the goods and recover from the original buyer damages for loss occasioned by his breach of contract These three cases are (1) where the seller expressly reserves a right of resale in case the buyer shall make default, (2) where the goods

are of a perishable nature, and (3) where he gives to the buyer notice of his intention to resell, and the buyer does not within a reasonable time pay or tender the price.

§ 165 **Acceptance by the Buyer**—The leading duties of the buyer are, first, to accept the goods, and, secondly, to pay the price

In the absence of any special agreement, the buyer is not entitled to have the goods sent to him He must take possession of them at the seller's place of business within a reasonable time

If the buyer has not previously examined the goods, he is entitled before accepting to a reasonable opportunity of inspecting the goods for the purpose of ascertaining if they are in conformity with the contract. The mere *receipt* of goods is not the same as *acceptance*, as the receipt may be merely for the purpose of examination

The buyer will be deemed to have *accepted* the goods—

1 When he intimates to the seller that he has accepted them, or

2 When the goods have been delivered to him and he does any act in relation to them inconsistent with the ownership of the seller, or

3 When, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them

A buyer who rejects goods, having the right to do so, may return them, but, as a rule, it is sufficient if he notifies the seller of his refusal to accept them.

§ 166 **Payment of the Price**—If no credit be given, the buyer of goods is not entitled to them until he pays the price, and he should be ready to do so as soon as delivery is tendered Where credit is given, the buyer is entitled to the goods at once, subject to the seller's right of stoppage whilst they are in transit, in case the buyer becomes insolvent (§ 163)

The contract may require the payment to be in one of two forms, viz "cash" or "bill" Sometimes the buyer has an option, *e g* "bill with option of cash, less discount" Where the payment is to be in "cash," and there is a

dispute as to the amount payable, care should be taken that any tender made by the buyer is in proper form The money should be actually produced, and an opportunity given to the seller to examine and count it. Copper coins are a valid tender up to 1s ; silver coins up to 40s , gold coins and Bank of England notes to any amount The exact sum should be tendered, as the buyer is not entitled to tender, with a demand for change, a larger sum than is due The buyer, if the amount paid is £2 and upwards, may tender a blank receipt, stamped, and the seller is bound to fill it up and pay for the stamp—a rule that practically throws on all creditors the duty of giving stamped receipts for sums amounting to £2 and upwards

Where payment is made by "bill," it is always implied, in the absence of any agreement to the contrary, that if the bill be not honoured the vendor is entitled to sue for the price. But the parties may agree that the bill is to be taken in absolute discharge of the debt—in such a case, if the bill be not honoured, the seller may sue on the bill, but he cannot sue for the price of the goods

Payment made to a duly authorised agent is the same as payment to the seller A buyer ought, however, to assure himself that the agent is authorised *to receive payment* A factor is an agent to receive payment, but a broker is not A shopman is authorised to receive payment over the shop counter, but not elsewhere An auctioneer, as a rule, can receive payment in cash

Where the seller prescribes a certain mode of payment, any payment made in such mode is good though the money never reach the seller Hence if the seller requests a remittance by post, such a form of remittance will be good though the letter be lost or stolen

§ 167 **The Transfer of Ownership**—The object of the contract of sale is to transfer the right of property or the ownership of the goods from the seller to the buyer

The practical importance of determining when the property passes lies in this, that, unless otherwise agreed, the moment the property passes to the buyer the goods are

at his risk, whether delivery has been made or not Any loss happening to the goods falls on the owner for the time being. If, for example, they are destroyed by fire after the ownership has passed, the buyer is bound nevertheless to pay the price if he has not already done so

A marked distinction is drawn between "ascertained" and "unascertained" goods By the former is meant specific individual good, *e g* a particular horse, a specific carriage, a particular bale of cotton By the latter is meant goods not specifically ascertained, *e g* goods that have to be manufactured, measured, or weighed

In the case of *unascertained goods*, the property does not pass until the goods are ascertained Goods are "unascertained" if they have to be manufactured Hence if a machine is ordered to be made, the property will not pass until the machine is finished Goods are also "unascertained" when the contract relates to a portion of a greater quantity, as, for example, where a buyer purchases 20 tons of oil out of the seller's stock until the 20 tons are set aside or marked as the actual oil to be supplied, the property in the oil will not pass to the buyer

The question sometimes arises as to the person who is to make the appropriation In one type of case, *e g* where a merchant gives an order to another to send him a certain quantity of merchandise, it is assumed that the right of appropriation belongs to the seller In a second type of case the appropriation is not regarded as complete until it has been assented to by the buyer In a third type of case the buyer has, by the terms of the contract, the right of appropriation It is obvious that when the contract is silent on the point, the questions as to who is to appropriate, and when the appropriation is to take place, depend largely on the circumstances of each case.

In the case of *ascertained goods* the property is transferred at such time as the parties intend that it shall be transferred If the parties have expressly agreed that the property shall be transferred at a particular time, it will be transferred at that time But when, as more often happens, the parties have made no express agreement

their intention must be gathered from their conduct and all the circumstances of the case.

§ 168. Rules for ascertaining Intention of the Parties as to Transfer of Property.—The following rules are laid down for ascertaining the intention of the parties as to the time at which the property of the goods is to pass to the buyer, unless a different intention appears:—

Rule 1 Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2 Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof

Rule 3 Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof

Rule 4 When goods are delivered to the buyer on approval, or "on sale or return," or other similar terms, the property therein passes to the buyer—

(*a*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction

(*b*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5 (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer Such assent may be express or implied, and may be given either before or after the appropriation is made

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract

§ 169. **Reservation of the Right of Disposition** — The seller may by the contract reserve to himself the right to dispose of the goods until certain conditions are fulfilled In such a case, notwithstanding delivery, the property does not pass until the conditions are fulfilled When goods are shipped by a seller in one place to a buyer in another, the seller may desire to reserve the right of disposition until the seller has accepted a bill in payment One way of effecting this is to ship the goods by a bill of lading deliverable to the order of the *seller* or his agent (see § 210) If the seller does this he is presumed, in the absence of evidence to the contrary, to have reserved to himself the right of disposition

§ 170. **Title acquired by the Buyer** —As a general rule, a buyer acquires no better right or title to the goods than that possessed by the seller It follows from this principle that if the seller has stolen the goods, the buyer, even though unaware that the goods have been stolen, will not acquire the ownership

In the interests of trade, and for the protection of dealers, certain exceptions to the above rule have been admitted by the law. The most important of these exceptions are as follows —

1. Where goods are sold in "market overt," according to the usage of the market, the buyer acquires a good title, provided he buys them (*a*) in good faith, and (*b*) without any notice of any defect or want of title on the part of the seller.

The sale in market overt means a sale in an open public market, lawfully constituted by charter of the crown, prescription, or statute The sale must take place wholly in the market, during market hours, on a market day, and toll, if due, must be paid In the case of horses certain special statutory requirements must be complied with, and even then the buyer in good faith has not a perfect title By the custom of the city of London every shop in the city which is open to the public is market overt between sunrise and sunset on all working days, for the sale by the shopkeeper of such goods as he professes to deal in

But when goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen re-vests in the person who was the owner of the goods, although in the meantime they may have been sold in market overt

2 When goods are sold in the ordinary course of business by a factor (§ 53) who is, with the consent of the owner, in possession of the goods, such sale is as valid as if the factor were expressly authorised to sell them, provided that the buyer acts in good faith and without notice that the factor has no authority to sell them

§ 171. Remedies of Seller and Buyer.—Reference has already been made to the remedies that the seller may adopt where the buyer refuses to pay the price, and the goods have either not left the seller's possession or are in the course of transit (§§ 162, 163)

Where the goods have reached the buyer, and the property has vested in him, the only remedy of the seller is to bring an action for the price Care must, however, be taken not to bring any action before the time at which the price is payable Interest can be recovered where there is an agreement for the payment of interest, or where the

creditor has demanded payment in writing and given notice that interest would be claimed from the date of such demand If the buyer refuses to accept the goods, the seller may bring an action for damages for non-acceptance. If the seller refuses to deliver the goods, the buyer may bring an action for damages for non-delivery The damages given will usually be the difference between the sale price and the market price on the day the goods should have been delivered, or if no time for delivery was fixed, the day of the refusal to deliver When the contract is for the delivery of specific or ascertained goods, the court may order the delivery of the goods

Where there has been a breach of warranty the buyer cannot reject the goods But his remedy is twofold He may (1) set up against the seller the breach of warranty in diminution or extinction of the price, and in addition or alternatively he may (2) maintain an action against the seller for damages for the breach of warranty

§ 172. Authorities —*The Sale of Goods Act, 1893*, by Ker and Pearson-Gee, contains the Act and a commentary *The Law relating to Sale of Goods*, by Judge Willis, K C, is an excellent short treatise for students The well-known works of Lord Blackburn and Mr Benjamin are standard treatises

CHAPTER II

INSURANCE

§ 173. Definition. — By a contract of insurance one person undertakes, in consideration of a payment called the premium, to indemnify another against some risk or to pay a sum of money on the death of some person to the assured or his representatives The system of insurance has been so extended during recent years that there is scarcely any form of risk that cannot be insured But the leading kinds of insurance are Marine Insurance, Life Insurance, and Fire Insurance The document in which the contract of insurance is contained is called the policy, the party who undertakes the risk is called the insurer, or, where he subscribes the policy, the underwriter, the party indemnified against the loss is called the insured or assured

§ 174 Fire and Marine Insurance based on Indemnity —In a life insurance the insurer undertakes to pay a fixed sum on the death of the person whose life is insured, but fire and marine insurances are contracts to indemnify against loss, and whatever sum be mentioned, the insurer is bound to do no more than make good the actual loss, and under no circumstances is the insured entitled to a profit out of the loss The result is that both parties have a common interest in the preservation of the thing insured If the insured has any means of making good the loss otherwise than at his own cost or that of the insurer, as by suing the person who caused the loss, he must either cede to the insurer the benefit of such means on being paid in full by the insurer, or he must himself exercise such means

for the benefit of the insurer The risks insured against are limited and defined in the instrument or policy embodying the terms of the contract In some exceptional cases, *i e* in "valued policies," the value of the article is agreed, and such agreement is conclusive, unless the insurer can prove that the value was inserted fraudulently, in which case the whole policy is void, or by mistake, in which case it can be rectified

§ 175. **All material Facts must be disclosed.**—Whatever be the kind of insurance, complete disclosure is required of all facts relating to the risk to be undertaken by the insurer If any information be kept back that would have affected the insurer in undertaking the risk, the policy will be void, even though the insured did not know it was material A concealment will have the same effect as a misrepresentation The insured is, however, only bound to disclose that which he knows, and where he has no information on any point raised he should say so

§ 176 **The Assured must have an Interest in the Subject Matter** —Any person may insure, provided he have an "insurable interest" in the event insured He must be in such a position that, if the event happens, he will gain an advantage, if it is frustrated, he will suffer a loss Except in the case of life and accident insurance he can only insure in respect of his interest and so that he may be indemnified against loss which will result to him from the happening of the event insured against

In the case of fire insurance the assured must possess an insurable interest, both at the date of the policy and at the time the fire happens As regards buildings, any one having an interest in the property can insure, but he can only retain out of the insurance moneys the value of his own interest. Common carriers, factors, brokers, wharfingers, and pawnbrokers have an insurable interest in the goods in their possession

§ 177. **The Premium** —The money payment in consideration of which the insurer undertakes the risk is called the premium It is the universal practice of insurers, except in the case of marine insurance, to stipulate that the

contract shall not take effect until the premium has been paid The premium may consist of a lump sum or of periodical payments. Where the premiums are payable yearly the insurance is from year to year, if they are paid half-yearly or quarterly the insurance is from half-year to half-year or from quarter to quarter. In the case of an insurance extending over a number of years, a certain number of days, called days of grace, beyond the day fixed for the payment of premiums are allowed for payment

Unless there is an agreement to the contrary, if a loss occur during these days of grace, the assured has no right of action on the policy Strictly speaking, the premiums should be paid on the day appointed Insurance companies, however, as a rule, provide that the policy shall be good and valid during the days of grace allowed.

It is a recognised rule that if the risk be not incurred the premium paid is recoverable—no risk, no premium The risk is regarded as the consideration for the premium, and if it be not incurred, the consideration fails and the premium must be returned On the other hand, if the risk once commences no portion of the premium is returnable

Marine Insurance

§ 178. Underwriting. —Marine insurance takes place where a ship or cargo or freight is insured against loss during a fixed time or between one port and another. The insurance is generally effected with individuals who are called underwriters, from the custom of the insurer entering into the contract by writing under or at the foot of the policy his name and the amount of risk he undertakes A well-known association of underwriters is known by the name of Lloyd's The members meet and carry on their business in rooms over the London Royal Exchange. Lloyd's underwriters individually sign their names at the foot of the policy, and opposite thereto the sum insured by each, in figures and also in words, with the date of so doing Each underwriter insures for the amount written opposite his name, and can in no cir-

cumstances be made liable for more than that amount, or in the event of a partial loss, for a proportionate part thereof This is called underwriting the policy for so much, and each underwriter thereby enters into a separate contract with the insured for the amount set opposite to his name Underwriting is also undertaken by companies, the form of underwriting depending on the articles of association or other instrument constituting the company A number of shipowners sometimes join together for the mutual insurance of their respective vessels Here there are no premiums, the losses in each year being made good by the members in proportion to the amount of ship property insured in the club Insurance brokers are usually employed to negotiate a policy by both the insurer and the assured

§ 179. **What may be insured** —Not only may a ship or its cargo be insured, but also any special property in the same, such as the shipowner's interest in the freight Freight is the price to be paid by a shipper of goods to the shipowner for the carriage of goods by ship It is not due unless the goods are delivered at the port of destination Many events might happen that would prevent such delivery, and in order to protect himself against possible loss, the shipowner may insure his expected freight

§ 180. **Kinds of Policies** —The leading kinds of policies are valued and open policies, and time and voyage policies

A *valued* policy is one in which the agreed value of the subject insured, as between the assured and the underwriter, is stated on the face of the policy This value is conclusive, whether it be greater or less than the value in the open market, unless the insurer can prove that the assured inserted the value fraudulently, in which case the policy is void Mistakes in valuation may also in some circumstances be rectified Ships and freights are almost always insured in valued policies

An *open* policy is one in which the value of the subject insured is not stated in the policy as between the assured and the underwriter, but is left to be proved by evidence in case of loss Goods are generally insured by open policies,

as their value can be ascertained by invoices, valuations, or other methods

A *voyage* policy is one in which the risk is undertaken during a particular voyage between ports specified in the policy, *e.g.* from London to New York.

A *time* policy is one in which the risk is undertaken during a fixed time specified in the policy, *e.g.* from noon of the 1st January 1903 to noon of the 1st January 1904

§ 181. **The Slip and the Policy**—When a broker is requested to effect an insurance, he prepares a brief statement of the leading particulars of the risk to be insured This statement, called the *slip*, is presented to the underwriters, who initial it for the sum each proposes to underwrite In the case of companies a separate slip is presented to each A policy embodying the terms contained in the slip is subsequently prepared and underwritten, as the law requires that every agreement for sea-insurance to be valid must be expressed in a policy The slip by itself cannot be enforced in the courts, but it is always treated by underwriters as if it were as binding as the policy itself, and, as it represents the terms to which the parties have agreed, these identical terms ought to be embodied in the policy

The form of policy in use is very complex, but as every clause has undergone a searching examination in the courts, the meaning of the various clauses is well known The policy is the only legal evidence of the terms of the contract, and after it has been underwritten no material alteration can be introduced without the consent of all parties

§ 182. **Terms of the Policy**—A policy contains the name of the insured, the name of the ship, the subject matter of the insurance, a statement of where the voyage is to begin and end, the perils insured against, permission for the insurer to take steps if necessary to protect the property, the date, the amount of premium, and the sum underwritten (see Appendix, p 171) The policy must be stamped The policy is of course only effective as an insurance against "the adventures and perils" enumerated in the policy It will be seen that these include (amongst others) perils

of the seas, fire, jettison, barratry, and "all other perils," *i e* all other perils of a like nature As to these, we need only say that jettison is the intentional throwing overboard of cargo or of the ship's effects so as to lighten the ship for the common safety Barratry means any wilful misconduct committed by the captain or crew without the connivance of the shipowner, and tending to his prejudice either as injuring or exposing to risk of injury, forfeiture, or seizure his property or the property entrusted to his care—such as scuttling the ship, smuggling, or illegal trading For any loss which is wholly outside the perils insured against the insurers are not liable.

§ 183 Warranties —Underwriters, for their own protection, often stipulate for the insertion of certain express warranties in the policy A warranty may be defined as a stipulation upon the truth or fulfilment of which the validity of the entire contract is to depend Express warranties usually relate to the time of sailing, *e g* where it is alleged that the ship has sailed or that it will sail on or before a certain day, or to the neutral character of the ship and cargo during a time of war Apart from these express warranties, there are certain warranties implied by law that have the same force as if they were formally set out in the policy itself

The leading implied warranties are (1) that the ship is seaworthy, (2) that the ship will not deviate, and (3) that the voyage is legal

1 *Seaworthiness* —In the case of a voyage policy, *i e* where the insurance is in respect of a voyage from one port to another, the policy implies that the ship is seaworthy at the outset of the voyage

By "seaworthy" is meant in a fit state as to repairs, equipments, crew, and all other respects, to encounter the ordinary perils of the voyage and complete her voyage in ordinary weather with reasonable despatch If the ship is lost, and it appears that she was unseaworthy, the underwriters are not liable on the policy In the case of a time policy, which is sometimes effected when the ship is at sea, no warranty of seaworthiness is implied.

2 *Not to deviate* —A deviation from the proper course of the voyage releases the underwriters, unless such deviation is rendered necessary by the accidents of the voyage

In almost all voyages usage has prescribed a certain course as the best, and it is risk to the vessel whilst pursuing this course that is insured against

3 *Legality of voyage* —An insurance on a ship engaged in a trade or venture illegal by the law of the country in which the insurance is effected is void, provided the assured knew of, or was in any way a party to, the illegality

For instance, an insurance in England on a vessel engaged in smuggling goods into England is not binding

§ 184 **Sue and Labour Clause.**—The insured is bound by law to use all reasonable efforts to avoid or minimise a loss, and unless otherwise agreed he cannot recover from the underwriters the expenditure incurred in using those efforts The sue and labour clause is inserted to enable him to recover those expenses from the underwriters Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the clause Thus if a policy exempts the underwriters from liability to pay for loss by capture, expenses incurred in preventing capture cannot be claimed. And the expenses must have been incurred by the insured or his agents, not by strangers If, for instance, a ship is left derelict and then towed into port by some one who finds her, there is no claim under this clause Lastly, the expenses must be reasonable, and such as a prudent owner would incur if he were not insured

§ 185 **The Memorandum** —At the foot of the policy is found a clause that has for its object the protection of the underwriter against trifling claims and the exemption of certain perishable goods from the policy except under certain circumstances The effect of the clause (in the example in the Appendix [1]) is as follows The underwriter

[1] The expression "warranted free from average unless general" means that it is agreed that the policy does not cover partial loss of

is not liable to make good (1) any partial loss in the case of corn, fish, salt, fruit, flour, and seed, (2) any partial loss under 5 per cent in the case of sugar, tobacco, hemp, flax, hides and skins; (3) any partial loss under 3 per cent in respect of other goods or of the ship and freight except in all these cases where the loss is incurred by the ship being stranded or the loss is a "general average loss" (see § 245)

§ 186. **Total and Partial Loss**.—A ship or a cargo or freight may suffer a total loss or a partial loss

A *total loss* of a ship is suffered where the ship ceases to exist as a ship and cannot reasonably be again made into a ship So also a cargo of a certain commodity is said to be totally lost where it ceases to exist as that commodity and cannot be reasonably restored to its former character Thus a cargo of hides may be so damaged as to be useless as hides, but it may be very good manure Nevertheless it is said to be totally lost because it is not, and cannot be made into, a cargo of hides A total loss of freight occurs where the ship or cargo is so damaged that the cargo cannot be delivered and consequently freight cannot be earned

A total loss may be actual or constructive When it is physically impossible to restore the thing insured to its original character the loss is *actual*, but when to do so is physically possible, but not worth the cost, and therefore impossible in a commercial sense, the loss is said to be a *constructive total loss* In this case the assured may give to the underwriters notice that he abandons the thing insured, and he may then claim as for an actual total loss The thing abandoned becomes the property of the underwriters, and they must pay the full value as for an actual total loss

A notice of abandonment must be unconditional and must be given as soon as the assured has received sufficient

the subject matter insured other than a general average loss A general average loss is expenditure voluntarily incurred in time of peril for preservation of the ship and cargo, a proportion of which falls upon the goods insured (§ 245)

information to enable him to make up his mind whether to abandon or not An assured is not at liberty to abandon a part of a cargo He must abandon all or none

If a ship is damaged, or part of a cargo is totally lost, or if, though damaged, it is not totally lost as defined above, or if part of the freight is lost, as where only a portion of the cargo is delivered, there is what is called a *partial loss*

If the ship is damaged, the underwriters have to pay part of the cost of the repairs As a rule they only pay two-thirds of this, as the assured is supposed to benefit to the extent of the other third by having new materials in his ship instead of old An exception is made in the case of new ships, where the underwriters pay the full cost, and it is now usual to insert a clause in policies to the effect that they shall pay the full cost of repairs to the hulls of iron ships

If part of a cargo is totally lost, the underwriters pay as for a total loss of that part, but in the case of damage to the whole or part of a cargo, the rule is more difficult

Unless a stipulation to the contrary is inserted in the policy, the rule for ascertaining the loss is as follows ascertain three things—(1) the value at the port of destination as if uninjured, (2) the value at the same port as if injured, (3) the original value. Then make the following calculation As the value uninjured is to the value when damaged, so is their original value to the fourth quantity This fourth quantity being subtracted from the original value, gives the amount to be paid by the underwriters For instance, suppose goods valued £100 in London are shipped to Calcutta, where they would sell uninjured for £200, but owing to damage incurred on the voyage they bring £150

200 150 100 x

The solution of this problem gives £75 Subtracting £75 from £100, we obtain £25 as the sum to be paid by the underwriters.

In this case the assured lost one-fourth the value of the

goods at the port of destination, but the underwriter does not undertake to repay him more than one-fourth of the original value. The original value is regarded as the invoice price at the port of loading, plus the expenses of putting the goods on board, the premium for insurance, and commission

§ 187. The Law of Marine Insurance has now been codified in the Marine Insurance Act, 1906, amended by the Marine Insurance (Gambling Policies) Act, 1909, which latter Act makes it a criminal offence to effect a contract of marine insurance when the insured has no insurable interest in the subject matter insured

Fire Insurance

§ 188. **Definition and Nature of the Contract.**—The contract of fire insurance is a contract by which one party, in consideration of the payment of a sum of money, undertakes to make good any loss or damage by fire, not exceeding a named amount, which may occur during a specified period The contract is, as we have pointed out, one of indemnity—the sum named in the policy is not the measure of the loss, but the limit of what can be recovered The assured must have a pecuniary interest in the subject matter As a rule, any subsisting right or interest in the property insured is an insurable interest A trustee, for example, may insure the trust-estate, and so can the person entitled to the income of such estate An insurance company in which property is insured has a sufficient "interest" to enable it to reinsure When an insurer would be involved in very heavy loss upon a policy in the event of a fire, he often re-insures so that he is insured with some other insurer against part of this loss In this way the loss may be ultimately distributed among a number of offices Any one who has possession of property and is responsible in case it is destroyed by fire can insure, *e g* a pawnbroker, a factor, a warehouseman, a wharfinger, and a common carrier, has each an insurable interest in property that

comes into his possession in the ordinary course of his business

§ 189. The Risk undertaken.—An insurance company that undertakes the risk to property through fire usually inserts stipulations in the policy with the object of defining the risk more clearly

By "fire" is meant ignition of the property itself or some substance near it not used to create heat. Damage arising from excessive heating without fire is not damage due to fire within the meaning of a policy Something must catch fire, but so long as this occurs any resulting loss, *e.g.* by smoke or by water used to put out the fire, is recoverable though the insured property has not itself caught fire In case a fire is due to an explosion, the company is liable, but not where the explosion of itself causes the damage Clauses are frequently inserted in a policy with the object of defining the company's liability where there is an explosion, *e.g.* "The policy does not cover loss or damage by explosion, except loss or damage by explosion of gas in a building not forming part of any gas works, or by explosion of domestic boilers and domestic heating apparatus" Gas works are excepted as a specially hazardous risk

Loss due to the natural heating that occurs sometimes in hay, corn, seeds, and other property is usually excluded, *e.g.* "The policy does not cover loss or damage by fire to property occasioned by or happening through its own spontaneous fermentation or heating"

It is also usual to except any loss by fire due "to invasion, foreign enemy, riot, or civil commotion"

As to the *property insured* care must be taken to see that the policy covers all the property intended to be included, and that the ownership of the property is correctly described As a rule, "property held upon trust or upon commission" is excluded unless expressly described as such An insurance by a husband of his own property does not cover the property of his wife or of his servants or his visitors

§ 190. The Proposal.—Where it is desired to effect an

insurance against fire, it is necessary to make a proposal stating particulars of the risk to be insured In drawing up this proposal care should be taken (1) to describe accurately the property to be insured and the building, if any, in which it is contained, (2) not to make any misstatement, (3) not to omit any known fact material in estimating the risk Not only does non-disclosure of material facts known to the proposer vitiate the policy at law, but a clause in the policy itself usually declares that it is to be void if such non-disclosure exists Misrepresentations have a similar effect

§ 191. Conditions that are to avoid the Policy.—A fire policy, as a rule, enumerates certain matters which if they occur are to avoid the policy The more important of these are as follows —

1. Misdescription or omission of material facts in the proposal.

2 Increasing the risk subsequent to the policy by doing anything to the property or to any building in which it is contained without the consent of the insurer.

3 Removing the property without the consent of the insurer

4 Assigning the property otherwise than by will without the consent of the insurer, unless the policy be assigned as well

§ 192. The Premium.—The premium is usually payable at the time the insurance is effected, the policy not being issued until such premium is paid

Subsequent premiums are payable yearly, a certain number of days of grace being allowed by some offices A clause is sometimes inserted to the effect that the policy is not to become void notwithstanding the occurrence of a loss by fire within the days of grace allowed, provided the premium be duly paid on or before the expiration of such days

§ 193 Occurrence of a Loss—A policy requires the assured when the loss occurs to give notice to the company and to deliver within a certain time a statement of the articles lost, with an estimate of their value at the time of

the fire, and to support such statement, if required, by proofs and explanations. A statutory declaration as to the truth of the statement may also be required.

An insurance company usually reserves to itself the right to reinstate or replace the property injured instead of paying the value of the damage sustained

§ 194. **Concurrent Policies.**—The assured may effect insurances on the same property in several offices. In such a case, apart from any stipulations in the policies, he may recover from any one office, but if one office pays, it is entitled to a contribution from the other offices A clause is usually inserted in a policy to restrict the liability of each office to a proportionate amount of the loss, *e.g.* "If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the assured or by any other persons, covering the same property, the company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage" The apportionment of the loss between several companies is a difficult matter. As a rule, it is undertaken by the insurance offices concerned or is referred to arbitration

Life Insurance

§ 195. **Not an Indemnity.**—A life insurance is a contract by which the insurer, in consideration of a premium paid by the assured, undertakes to pay to the person insuring or his personal representatives a certain sum of money in case the assured dies within the period covered by the insurance The contract is an agreement to pay a given sum at death, it is not a contract to indemnify against loss which the assured or any one else suffers by the death of the person whose life is insured Very commonly a person insures his own life, and the insurers undertake to pay the amount insured to his administrators, executors, or assigns upon his death

§ 196 **Insurable Interest.**—The person insuring must possess, at the time when the insurance is effected, an

"insurable interest" in the life of the party insured Every person has an insurable interest in his own life and in that of his or her wife or husband In all other cases the interest must be pecuniary, that is to say, it must be such that the insured stands to lose something of money value by the death of the life insured, and the amount for which he may lawfully insure is the amount of his pecuniary interest. So a creditor has an insurable interest in the life of his debtor to the amount of the debt, but a parent has no insurable interest in the life of his children Insurances with Friendly Societies for small sums for funeral expenses of children, parents, and other near relatives are, however, now permitted by statute, though the moral obligation to incur funeral expenses does not, except in such cases, constitute an insurable interest.

§ 197. **The Proposal and the Policy** —The first step usually taken towards effecting an insurance is the filling up of a proposal giving particulars relating to the health and habits of the proposer A declaration has also to be signed that the statements are to be taken as the basis of the contract, and that any untrue statement shall avoid it This document is regarded as part of the policy The greatest care should be taken in filling up the proposal, as any mis-statement will prevent the insurance moneys being received, even though the proposer *bona fide* believed such statements to be true. The policy itself states the names of the parties, the risks insured against, the time during which it is to be in force, and the amount of the premium The policy usually provides that it shall be forfeited by non-payment of the premiums, by residence outside certain specified limits, and in the event of death by suicide, duelling, or the hands of justice, except so far as the *bona-fide* interests of third parties are concerned This exception is introduced so as to protect the interest of any person who has purchased the policy or acquired any interest in it. (For a Form of Proposal and Policy see Appendix, p 167)

§ 198 **The Premium.**—The premium is usually made payable in annual, or half-yearly, or quarterly instalments Sometimes a single payment is made to cover all premiums

Strictly speaking, the premium is payable on or before the day appointed, even though days of grace are allowed. But it is the general custom of insurance companies, in the case of death after the day for payment, but before the days of grace have expired, to pay the amount of the policy, less the premium due The assured should take care to see that such a clause is inserted in the policy It is also usually provided that if the policy lapse by non-payment of the premium within the days of grace, it shall be renewable by the assured on payment of a fine

§ 199. **Assignment.**—A policy of life insurance may be assigned or sold to a third party The assignment must be in writing, and notice in writing must be given to the insurer A policy may also be mortgaged to secure the repayment of a sum of money.

§ 200. **Other kinds of Insurance.**—Insurances are often made against other risks than those above mentioned. Accident insurance is akin to life insurance The insurer, in consideration of a premium, agrees to pay to the assured a fixed sum in case of accident or illness, or a fixed sum per week during incapacity from accident or illness Insurance against burglary or housebreaking is analogous to fire insurance, as also is guarantee insurance, a form of insurance in which the insurer undertakes to make good losses by dishonesty of servants or officials In all these the risks insured against appear in the policy, and care must be taken that the policy covers all the risks against which it is desired to insure So a policy against burglary and housebreaking does not entitle the assured to be indemnified against loss by theft which does not amount to burglary or housebreaking

§ 201. **Authorities.**—*The Law of Insurance*, by Mr Porter, deals with fire, life, accident, and guarantee insurances, as also does Mr Hartley's *Analysis of the Law of Insurance* and MacGillivray's *Insurance Law* Marine insurance is treated at length by Mr Lowndes, Mr Arnould, and other writers *The Marine Insurance Act, 1906*, by Sir M D Chalmers, contains the Act with excellent notes Mr. Welford has written at length on Fire Insurance

CHAPTER III

GUARANTEES

§ 202 **Nature of a Guarantee**—A guarantee is a contract by which one person undertakes to be answerable for the payment of a debt or the performance of an act, in case another person who is primarily responsible fails to pay the debt or to perform the act. The person primarily liable is called the "principal," and the person who gives the guarantee the "surety"

A guarantee implies that there is a contract on which a principal is primarily liable, the liability of the guarantor being secondary, *i e* arising only on the principal's default. The proper form of a guarantee is, "If A. does not pay you, I will" Here the writer clearly indicates that payment must be sought from A, and resort is to be had to himself only in case A makes default Expressions such as, "If you supply goods to A, I will pay you," are equivocal, since the words may mean either a guarantee or that a primary liability is undertaken All the circumstances must then be examined in order to see to whom credit was really given If, for example, the goods were debited to A, then it is clear that A. was treated as principal.

§ 203 **Form of Guarantee**—The Statute of Frauds enacts that no action shall be brought upon any promise to guarantee the debt of another, unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised. Oral

guarantees are not by this statute made wholly void if the guarantor or surety discharges the obligation the transaction is good But if the principal does not discharge the promise, an action cannot be brought against the guarantor. The writing should show the names of the parties and the promise, but the consideration need not be stated in writing provided there is an existing consideration

§ 204. Liability of the Surety.—The surety is liable on the default of the principal, and once the principal has committed a default the surety may be sued at once In other words, the creditor is not obliged to sue the principal before suing the surety, nor is he obliged to give the surety notice of default having been made, nor need he demand payment from the surety If the surety desires to secure that the principal shall be sued first, and that he shall have notice given him of any default, and that he is not to be liable until a demand for payment is made, he must secure that suitable provisions are inserted in the guarantee

The extent of the surety's liability depends upon the terms of the guarantee The instrument may contain limitations as to amount or as to time As regards time, a guarantee may be a "continuing" one or not

§ 205. Continuing Guarantee.—A continuing guarantee is one that is not restricted to a single dealing If A guarantees the payment of any debt B may contract in his business, not exceeding £100, A makes himself liable for any debts not exceeding £100 which B may from time to time contract in his business Hence if the guarantor desires to be surety for a single dealing only, he should take care to say so

§ 206. Fidelity Guarantee —Guarantees are frequently given for the fidelity of a person engaged in an office, or in some employment Care should be taken to state distinctly whether the guarantee is intended to apply to an appointment to another but similar office As a rule, any material alteration in the duties of an office or appointment to a new office discharges the surety

§ 207. Rights of the Surety.—A surety who discharges the whole or part of the debt has a right of action against

the principal for what he has paid This right of action does not arise directly out of the contract of guarantee, inasmuch as that contract is one entered into between the surety and the creditor the principal is not a party to it But when a guarantee is given by one man at the request of another, the law treats the payment of the debt by the surety as a payment at the request of the principal, and gives the surety an action against the principal for the amount paid Where the surety pays the debt, he is entitled to the benefit of all securities which the principal may have given the creditor to secure payment

Where there are several co-sureties, any one paying the debt has a right to compel the others to contribute their respective shares This right arises the moment the surety has paid more than his share of the common debt No contribution arises where the liability of each surety is limited to a given sum, inasmuch as in such a case each is bound to pay that sum and no more. The right exists only where the sureties are bound jointly or jointly and severally The power of a surety to call on his co-sureties for contribution before he has paid anything, or where he has paid his share only, is doubtful probably he could call upon them to give him an indemnity against having to pay more than his share

§ 208. Discharge of the Surety —The guarantee may be void *ab initio*, and have no legal effect. For instance, if the consideration for which it is given fails, or if the creditor alters the instrument of guarantee after its execution in a material point, the surety is discharged

A guarantee often contains a clause that the surety may revoke it on notice to the creditor. In such a case, notice will always discharge the surety If the guarantee contains no such clause, the right of the surety to revoke it depends on the nature of the guarantee The substitution of a new agreement for the guarantee before breach will discharge the surety from all liability under the old agreement. The death of the surety, though it does not affect the liability of his estate in respect of past transactions, will operate as a revocation, provided the guarantee could have been

determined by notice If, however, the surety could not have put an end to the guarantee by notice, his liability remains

The conduct of the creditor may operate as a discharge of the surety The general rule is, that if the creditor does any act to the prejudice of the surety, the guarantee is at an end Hence any material variation from the terms of the contract made between the principal and the creditor discharges the surety, on the ground that the surety became surety on the faith of the original agreement For instance, a building contract provided that three-quarters of the work as finished should be paid for every three months, and the remaining quarter on completion Payments of more than three-quarters were made without the consent of the sureties before the work was completed, and it was held the sureties for the performance of the work were discharged

The terms of the agreement between the principal and surety must also be carefully observed or fulfilled, otherwise the surety is not liable, *e g* a surety for moneys "to be received" by another is only liable for moneys actually received by that other

A surety is discharged if the creditor without his consent agrees to give the principal time for payment, even though no injury actually accrues to the surety The agreement to give time must, however, be one that the principal could enforce We have seen that unless the extension of time given by a creditor to a debtor is supported by a consideration, the creditor is not bound to wait, but may sue at once. In such a case there is an agreement without a consideration, *i e* there is no contract. But if the creditor enters into a binding agreement with the principal, for consideration, to give the surety an extension of time, the surety is discharged, because the right of the surety to pay the debt and sue the principal is affected The surety by a contract made between himself and the creditor may secure time for payment provided he gives some consideration Any negligence of the creditor in doing what he is legally bound to do, by reason of which the position of the surety

is made worse, will discharge the surety as for instance where the principal did not present a bill of exchange for payment when it became due, and the parties liable to pay subsequently became insolvent A surety, as we have seen, is on payment of the debt entitled to the securities held by the creditor The creditor is bound to use due diligence in taking care of such securities, and if he lose them the surety is discharged.

The guarantee may also come to an end by payment of the debt by the principal and by release of the debt by the creditor

When default is made by the principal, the surety should be sued within six years if the guarantee is not under seal, twenty years if it is under seal, otherwise the right of action is extinguished by the Statute of Limitations

§ 209. Authorities.—Smith's *Mercantile Law*, De Colyar's *Law of Guarantees*, *The Law of Principal and Surety*, by Mr Justice Rowlatt.

CHAPTER IV

CHARTER-PARTIES AND BILLS OF LADING

§ 210 **Charter-parties and Bills of Lading**.—A merchant who is shipping goods may either ship them as part of a cargo or may hire an entire vessel where the goods are sufficient to fill the vessel. In the latter case the goods may not be his own, as for example where he takes the risk of collecting a cargo from various exporters. Where an entire ship is hired, a formal document embodying the agreed terms is prepared, called a *charter-party*. Where goods are shipped as part of a cargo, the contract may be a verbal one or it may be collected from the notices issued by the shipping company, but on the delivery of the goods on board, a receipt, called a *bill of lading*, is given by the shipowner or his agent, and though this bill of lading is not the contract itself, it is evidence of the contract. A bill of lading contains the conditions upon which the shipowner receives the goods for carriage. It is usually on a printed form, the contents of which are well known to shippers, and is often filled up by the shipper. A shipper who presents a bill of lading for signature, or accepts one without protest, will generally be taken to have agreed to all its terms.

By a charter-party the charterer usually secures the use of the vessel and the services of the master and crew for a particular voyage. By a bill of lading the shipper secures a receipt for the goods. If the bill of lading makes the goods deliverable "to order" or "to order or assigns," it

may be endorsed and delivered to another party, who thereby takes the property in the goods and acquires the same rights and liabilities as if it were originally issued to him

The amount payable to the shipowner for carriage and delivery of the goods is called *freight* The shipowner cannot claim it until he is ready to deliver the goods; the consignee of the goods (*i e* the person to whom they are consigned or sent) cannot have them unless he is ready to pay the freight.

§ 211. **Terms implied in Charter-parties and Bills of Lading** —It must be remembered that though the contract between the parties is to be sought in part in the charter-party or bill of lading, there are certain warranties or conditions implied in all contracts for the carriage of goods by sea, unless expressly excluded Thus there is an implied warranty that the vessel is seaworthy at the time of loading and sailing, and the shipowner impliedly contracts that the vessel will commence and complete the voyage with all reasonable despatch, and will not deviate from the usual course of navigation, except to save life or protect the vessel or cargo from some imminent peril Many of the clauses of charter-parties are inserted to qualify these implied warranties by limiting or enlarging their effect or excluding them altogether

CHARTER-PARTIES

§ 212 **Form of Charter-party.**—A charter-party is often a lengthy document containing many clauses regulating the rights of the parties according to the nature of the cargo and the voyage and the requirements of the parties In many trades there are forms in use which have been agreed to by representatives of the principal shipowners and shippers engaged in the trade. Most charter-parties, however, consist of an agreement whereby the shipowner agrees to bring the ship to the port of loading (the preliminary voyage), and there to load a full and complete cargo to be provided by the charterer, and being so loaded to proceed

to the port of discharge and there deliver the cargo on being paid freight It is provided also that the charterer is to be allowed a certain number of days for loading and unloading (lay days), and that if the ship is detained longer he shall pay damages at an agreed rate (demurrage) There are also provisions limiting the liability of the shipowner for loss of, or damage to, the goods from certain causes, such as the act of God, the King's enemies, and perils of the sea These excepted causes are called the excepted perils The charter-party may also contain a number of detailed provisions with regard to loading and unloading and other matters

A charter-party might be thus expressed, though in practice more elaborate forms are generally used :—

LONDON, *November* 5, 1902

(*a*) It is this day mutually agreed between X. Y. & Co, owners of the good Steamer called the *Black Rose*, British flag

(*b*) of the measurement 2000 register tons, or thereabouts, whereof Z is master

(*c*) now in the Port of Amsterdam, and A B & Co. of London, freighters [1]

(*d*) that the said Steamer, being tight, staunch, and strong, and every way fitted for the voyage

(*e*) shall with all convenient speed sail and proceed to Constantinople, or so near thereunto as she may safely get

(*f*) and there load, always afloat, from the Factors of the said Freighters, a full and complete Cargo of wheat and/or seed and/or grain at the option of the Freighters, which the said Freighters bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture

(*g*) and being so loaded shall therewith proceed to Liverpool or so near thereto as she can safely get, always afloat

[1] Or charterers.

(*h*) and there deliver the cargo

(*i*) on being paid freight [at so much per ton delivered, or otherwise as agreed]

(*j*) the Cargo to be brought and taken from alongside the Steamer at Freighter's risk and expense, but the crew to render all customary assistance in hauling lighters alongside.

(*k*) The Master has leave to sail with or without pilots, to call at any ports, to tow or be towed, and to render assistance to other vessels in distress

(*l*) Thirty running days, Sundays, Good Friday, Easter Monday, Whit Monday, and Christmas Day excepted, are to be allowed the said Freighters (if the Steamer be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days, at fourpence per ton on the Steamer's *gross register tonnage per running day*

(*m*) The Act of God, Perils, Dangers, and Accidents of the Sea or other Waters of what nature and kind soever, Fire from any cause on Land or on Water, Barratry of the Master and Crew, Enemies, Pirates and Robbers, Arrests and Restraints of Princes, Rulers, and *People, Explosions, Bursting of Boilers*, Breakage of Shafts, or any latent Defect in Hull and/or Machinery, Strandings, Collisions, and all other Accidents of Navigation, and all Losses and Damages caused thereby, are excepted, even when occasioned by negligence, default, or error in judgment of the Pilot, Master, Mariners, or any other Servants of the Shipowners

(*n*)

6D.
STAMP

(Signed) X Y & Co.
A. B & Co.

§ 213. **Analysis of Charter-party** —It will be observed that by this agreement the shipowner agrees to provide a ship, and to carry the cargo to the port of discharge and there deliver it. the freighter or charterer agrees to provide a cargo and bring it alongside the ship and to pay the freight, *i e* the shipowner's remuneration for carrying the cargo. If either party fails without lawful excuse to perform his part, he is liable to an action for damages If the shipowner does not provide a ship, or fails to deliver the cargo at the agreed port of discharge, he breaks his contract And if the charterer does not provide a cargo, or a full and complete cargo, the shipowner is thereby prevented from earning his freight and he has a cause of action for "not loading" The obligations thus entered into are, however, not absolute. Each party's obligation is to some extent dependent upon the other party's doing his part and complying with certain express or implied conditions, and, as we shall see, the shipowner carefully guards himself from being liable for not delivering the cargo if he is prevented by any one of a number of specified causes

§ 214. **Capacity of Ship** —Where a ship is registered her tonnage is registered at the same time This term "tonnage" has no reference to weight, it refers to register tons of 100 cubic feet When weight is referred to, the phrase "tons of 20 cwt" is used The total cubic capacity of the ship is called her "gross register tonnage" Certain deductions are made from the total cubic capacity for engine space, accommodation of the crew, and similar things, and the remainder is registered as the ship's "net register tonnage" A misstatement in the charter-party of the tonnage of a ship will not entitle the charterer to repudiate the charter-party unless the variation is so great as to materially affect the contract (clause *b*)

§ 215. **Preliminary Voyage** —The shipowner usually either agrees that the ship shall be at the port of loading by a specified date, or states where she is at the time when the charter-party is executed (*e g* "now at Amsterdam"), and agrees that she shall proceed to the port of loading with all convenient speed If she does not arrive by the agreed

date, or if in fact she is not at the place where she is stated to be, the charterer is released from his obligation to load Moreover, even if the place where she is is accurately stated, she must proceed with all reasonable despatch, and if her delay in reaching the port of loading is so great as to frustrate the objects of the adventure, the charterer is not bound to load the ship when she arrives The shipowner may also be liable to an action for damages if the ship does not duly arrive at the port of loading, unless he has protected himself by the excepted perils (§ 229)

§ 216. Seaworthiness.—The charter-party usually expressly requires the ship to be "tight, staunch, and strong, and every way fitted for the voyage" at the date of the charter-party, but this is not so important as the undertaking which is *implied* that the ship shall be seaworthy at the time of loading and sailing If when she arrives at the port of loading she is not seaworthy, and cannot be made so within a reasonable time, the charterer need not load He cannot be required to put his goods in an unseaworthy ship, or to wait for an indefinite time whilst she is made seaworthy To be seaworthy, a ship must be reasonably fit as regards design, structure, and equipment to carry the contemplated cargo on the agreed voyage, and to meet the perils ordinarily encountered on such a voyage The ship must also be seaworthy at the time of sailing, and if she is not so, and the cargo is lost or damaged in consequence, the shipowner is liable, even though the immediate cause of the loss is one of the perils for which he says he will not be liable (§ 229) This implied undertaking may, however, be excluded or modified by agreement, and often is

§ 217. Loading.—It is the charterer's duty (unless otherwise agreed) to provide the cargo and bring it alongside, and if from any cause he fails in this duty he is liable to an action for damages, unless he has protected himself, as he often does, by saying that he will not be liable if he is prevented by certain causes, such, for instance, as strikes, frost, etc. He must also provide a reasonable cargo of the kind which the shipowner has agreed to carry, and he is usually bound to provide a full and complete cargo, *i e* as

much as the ship can reasonably carry As the freight is usually payable in respect of the amount carried, it is obviously to the interest of the shipowner to have his ship full It is the shipowner's duty to put the cargo on board, and he is responsible for its being properly stowed He must also provide, when necessary, ballast and dunnage Dunnage means mats, bamboos, or other suitable material for keeping the cargo from being damaged by contact with the sides and bottom of the ship

§ 218 The Voyage.—The shipowner impliedly undertakes to proceed on the voyage with all reasonable despatch and without deviating from the usual and proper course of the voyage, except in so far as may be reasonably necessary for the safety of the ship and cargo To call at an intermediate port is a deviation, but it may be justified if it is reasonably necessary to shelter from a storm or do necessary repairs The master may also deviate to save life, as, for instance, to take the crew of a derelict vessel, but, unless otherwise agreed, he may not deviate to save property, as by taking a disabled vessel in tow and towing her to some place of safety

§ 219 Call at any Port, etc.—The implied undertaking not to deviate may be varied or excluded by express agreement In most charter-parties the ship is expressly allowed to take vessels in tow, to deviate to save life or property, and to call at certain specified ports or at any port or ports The extent to which she may deviate is often very fully prescribed, but any deviation outside what is permitted is a breach of the shipowner's undertaking

The consequences of unjustifiable deviation are very serious Not only is the policy of insurance avoided, but the shipowner is precluded from relying on the express exceptions to his liability for loss of or injury to the goods (see § 230).

§ 220. "So near thereto as she can safely get."—When a vessel is chartered to go for loading or discharging her cargo to a port "or so near as she can safely get," if she cannot get to the named port when she arrives near to it, she must wait a reasonable time to see if the obstacle to

her arriving is removed, or if after waiting a reasonable time she is still unable to arrive there, then she may proceed to another place as near thereto as possible What is a reasonable time depends on circumstances, *e g* where a vessel arrives in a tidal river at low tide, she must wait until the tide rises, if a harbour is frozen she must wait until the ice melts, and if a dock be full she must wait a reasonable time for a vacancy

The word "safely" in the clause means safely for a vessel having a cargo on board Hence if the master finds that he cannot, on account of the weight of the cargo he is loading, get outside the harbour with a full cargo he is not bound to load part of his cargo in the harbour and part outside, for a ship cannot be said to safely get to a place from which she cannot safely get away with a full cargo Similarly, if this clause referred to a port of discharge, the master would not be bound to unload part of his cargo outside the port and then unload the rest inside.

§ 221. "And there deliver"—Unless otherwise agreed, the shipowner's duty is to take the cargo out of the ship and put it "over the rail," and it is the charterer's duty to take it "from alongside," and to provide such labour, lighters, etc., as may be necessary for this purpose Until he has in this way put the cargo into the possession of the charterer or his agents he has not delivered the cargo, and he is still responsible for its safety Nor can he claim freight payable on delivery

§ 222 Freight.—In the absence of agreement to the contrary, freight is payable only on delivery of the cargo The shipowner is not entitled to it unless he has actually delivered, or is ready to deliver and willing to do so on being paid the freight If from any cause whatever he cannot deliver the goods at the port of discharge he has not earned his freight, even though he may have carried the cargo half round the world, unless the non-delivery is due to the fault of the charterer Shipowners, however, often stipulate for payment of the whole or a part of the freight in advance, that is, when the cargo is put on board, or as soon as the ship sails If this is the arrangement

the freight is payable, and cannot be recovered back if the goods are lost on the voyage Such an arrangement is obviously beneficial to the shipowner

§ 223. **Lump Sum Freight**.—Freight is usually payable at the rate of so much per unit (ton, bale, etc) delivered or shipped Sometimes, however, a "lump sum freight" is agreed upon, *i e* a fixed sum for the voyage, or for a period of time irrespective of the amount carried or delivered When a lump sum freight is agreed upon to be paid on delivery it is payable if part only of the cargo is delivered, the rest having been lost by some peril for which the shipowner is not liable

§ 224. **Port Charges.**—On the shipment of goods certain charges are usually levied by the port, and a percentage on the freight, called primage, is payable to the shipowner, who usually allows part of it to the shipping agent If the sum paid as freight is to include these or any other charges, a statement to that effect should be inserted

§ 225 **Cessio Clause**.—Sometimes a cessio clause is introduced, the effect of which is that once the cargo is loaded the shipowner has no claim against the charterer for freight, but looks to recovering it from the shippers of goods This clause is in use when the charterer does not intend to load with his own goods, but merely to find shippers, who ship under bills of lading The charterer is responsible for dead freight if a full and complete cargo is not loaded But if it is loaded the liability of the shippers to pay freight is sufficient protection for the shipowner

§ 226 **Demurrage**.—A certain time, *e g* thirty days, is allowed for loading and unloading The time for loading or unloading begins when the ship is ready to load or unload at the place appointed and the charterer has notice of this fact The shipowner must always give notice to the charterers of the ship's readiness to load at the place agreed upon The days allowed for loading and unloading are called "lay days" If the ship take longer than the lay days to load and unload, a stipulation is frequently put in the contract that the charterer is to pay a fixed sum per

day for every day so occupied beyond the lay days This sum is called "Demurrage" Where no sum is agreed, the shipowner has a claim for damages for detention, though the term "demurrage" is often used to cover such claim for damages If no time is fixed for loading or unloading, the law implies that a reasonable time is allowed, and if such time be exceeded, either demurrage or damages for detention is payable

§ 227. **Dead Freight**.—We have seen that when the charterer does not load a full and complete cargo the shipowner suffers loss of freight This loss is recoverable as "dead freight," which is the difference between the freight earned by a full and complete cargo and then earned by the cargo actually loaded

§ 228. **Lien for Freight, etc**.—At Common Law the shipowner has a lien on the cargo for all freight which is payable at the time the goods are delivered, and is not bound to deliver the cargo until the freight is paid If it is desired to give him a lien for anything else (*e g* for advance freight, dead freight, or demurrage) it is necessary to have a special stipulation to that effect in the charter-party.

§ 229. **Excepted Perils**.—The last clause is one of great importance and should be carefully considered by a charterer. Apart from this clause the shipowner's undertaking to deliver the goods is absolute, and he is liable for all loss or damage that happens to them unless caused by fire or (perhaps) through the act of God, the King's enemies, or the inherent unfitness of the goods to be carried By this clause, however, the shipowner declines responsibility for the loss of or damage to the goods when due to a number of different causes, such as perils of the sea, pirates, robbers, etc Indeed in many charter-parties these exceptions have been so elaborated as to cover almost every conceivable cause of loss or damage The shipowner is, however, bound to take care to avoid loss or damage even by the excepted perils, and is liable for such loss or damage if by taking reasonable care he or his servants could have avoided it, unless, he adds, as he often does,

"even when occasioned by negligence" Moreover, unless otherwise agreed, if the ship was unseaworthy at sailing, and that unseaworthiness caused the loss or damage, the shipowner is liable even though the immediate cause of the loss or damage is some excepted peril, such as "perils of the sea." The excepted perils may be so framed as not only to protect the shipowner from liability for loss of or damage to the goods, but also to protect him from liability to an action for damages if the ship does not duly arrive at the port of loading (§ 215), and to protect *the charterer* from liability if he is unable to provide a cargo

§ 230 **Deviation and Excepted Perils.**—If, however, the shipowner has unjustifiably deviated, the shipowner can no longer rely on the excepted perils He has broken his contract in such a fundamental way that he cannot rely on it, and however many excepted perils the charter-party may contain, they do not help him He is liable for all loss of or damage to the goods except such as is caused by an act of God or the King's enemies or the inherent unfitness of the goods to be carried, *e g* their perishable nature.

§ 231 **Construction of Excepted Perils.**—The excepted perils vary in every trade and with every shipowner, the tendency being to increase their number, so as to enable the shipowner to avoid as much liability as possible

The principal perils excepted in clause *m* of the charter-party above set out are —

1 "*The act of God*," which includes any accident due to natural causes, and such as is not due to and could not be prevented by human intervention A frost is an act of God, but where a captain filled his boiler overnight, and a frost came on and burst the tubes, the goods being thereby damaged, it was held that the accident might have been prevented, and was not due to the act of God

2 "*Dangers and accidents of the sea*"—"Perils of the sea" is a phrase used to cover any damage to the goods carried, by sea-water, storms, collisions, strandings, occurring to a vessel at sea and arising out of the sea The damage

must result directly from a peril connected with the sea, such as being wrecked, collision with an iceberg, rough weather, and not from perils which, though occurring when the vessel is at sea, are not peculiar to the sea, such as ordinary wear and tear, or the bursting of boilers, or rats or other vermin

3 "*Fire*"—This exception will protect the shipowner from liability for damage caused by fire to the cargo whilst on a wharf or in a warehouse as well as whilst at sea Even without any express clause the shipowner is not liable for damage by fire on the ship happening without his default

4 "*Barratry of the master and crew*"—Barratry is any criminal or fraudulent act on the part of the master of a ship, or the mariners, causing damage to the cargo, *e g* boring holes in a ship to scuttle it, breach of port rules resulting in detention of the ship, or fraudulent deviation from the course.

5 "*Enemies*"—This refers to damage by the enemies of the State to which the vessel belongs during a war

6 "*Arrests or restraints of princes, rulers, and peoples*" —This exception does not refer to ordinary legal proceedings, but to the seizure of the vessel by a State, or the ships of a State For instance, if the vessel is seized whilst running a blockade, it is liable to be confiscated by the squadron that is blockading the port If France were at war with Germany, and France were to blockade a German port by prohibiting access to it through the presence of a French squadron, an English vessel trying to enter such port would be liable to capture and confiscation

7 "*Strandings and collisions*"—Strandings and collisions may be perils of the sea, and therefore come under a former heading, but in some cases they would not be regarded as perils The proviso exempts the shipowner from liability even when the stranding or collision is "occasioned by negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowners."

Bills of Lading

§ 232. Definition.—A bill of lading is a receipt for goods shipped in a vessel, signed by the person who contracts to carry them, and stating the terms on which the goods are to be carried. The bill of lading is not necessarily the contract itself, as that is made before the bill of lading is signed, and accordingly it is only signed by the shipowner or the master or some other person as his agent. As a rule, the conditions embodied in a bill of lading on which goods are to be carried by a particular line of vessels are well known, and when a shipper forwards goods for carriage he is supposed to contract with reference to such conditions. A bill of lading, though not the contract, is evidence of the contract.

§ 233. Form of a Bill of Lading.—Different trades use different bills of lading, and many of the forms in use contain very elaborate provisions, but all the essential clauses are contained in the following short form:—

(*a*) Shipped in good order and condition by *A B*

(*b*) in and upon the good Steamship *Isis*

(*c*) now lying in the Port of *London* and bound for *Bombay*

(*d*) with liberty to call at any port or ports for coaling and/or loading and/or discharging or other necessary purposes

(*e*) *20 packages of merchandise* being marked and numbered as per margin

(*f*) and to be delivered in like good order and condition at the Port of *Bombay* unto ——— or to his or their assigns

(*g*) he or they paying freight on the said goods on delivery at the rate of [*specifying rate*], and charges as per margin

(*h*) It is mutually agreed that the Ship shall have liberty to sail without pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life.

(*i*) The Act of God, Perils, Dangers, and Accidents of the Sea, Fire from any cause, Barratry of the Master and Crew, Enemies, Pirates, Robbers, Arrests and Restraints of Princes, Rulers, and People, Strandings, Collisions, and all other Accidents of Navigation, and all Losses and Damages caused thereby, are excepted

(*j*) The Ship shall not be liable for incorrect delivery of packages unless each of them shall have been distinctly marked by the Shippers before shipment

(*k*) General Average payable according to the York-Antwerp Rules

(*l*) In witness whereof the Master or duly authorised Agent of the said ship hath affirmed to the [three] Bills of Lading, all of this tenour and date, one of which Bills being accomplished, the others are to stand void

Dated in ——— this ——— day of ——— 190

(*Signed*) C. D, *Agent for the Shipowner*

(*m*) Weight, quantity, quality, and contents unknown

§ 234 **"Shipped in good order and condition."**—The bill of lading begins with an acknowledgment or admission by the shipowner (made through his agent signing the bill of lading) that certain goods have been shipped, and that when shipped they were in good order and condition If at the end of the voyage they are not forthcoming, or if they are not then in good order and condition, the shipowner's admission throws on him the burden of proving either that they were not shipped at all or that they were not in fact in good order and condition when shipped and if (as is probable) he cannot prove this, it follows that they must have been lost or damaged (as the case may be) during the voyage, and he is liable to account for the loss or damage and pay for it unless he can show that it was due to some cause for which he is not liable

§ 235 **"Weight, quantity, quality, and contents unknown"**—The shipowner does not know and cannot know anything about the contents or quality of the packages, except what the shipper tells him And he usually takes

the weight and quantity from the shipper He therefore guards himself by the words at the end of the form (*m*) by saying he knows nothing about these In effect the admission that the goods described were shipped in good order and condition taken with these qualifying words amounts to his admitting that he has received on board certain packages described as containing goods of a certain kind and of a certain weight, etc, but that he himself knows nothing about the contents, weight, etc Nor does he know their quality, and he only admits that externally, so far as he could see, they were in good order and condition

§ 236. "Being marked."—The packages are usually marked with letters and figures for the purpose of identification These marks are entered in the margin of the bill of lading to show to what goods it relates. Some description of the contents (*e g* 10 bales cotton) and their weight are also often entered

§ 237. "To be delivered in like good order."—The shipowner admits that the terms upon which he has received the goods are that they are to be delivered at the port of discharge in the like good order and condition in which they were shipped If this stood alone it would amount to an absolute undertaking by him, but he afterwards qualifies his undertaking by stating (*i*) certain exceptions He says in effect that he undertakes to deliver them in the like good order and condition unless prevented by the act of God or one of the other specified perils

§ 238 "Unto ——— or his or their assigns."—The shipowner generally undertakes to deliver unto a named consignee or his order or assigns, or to the shipper or his order or assigns (clause *f*) If delivery is to be "unto order or assigns," this means unto the shipper's order or assigns A bill of lading in either of these forms is negotiable by endorsement and delivery And upon a sale of the goods the shipper may pass the property and possession in them whilst they are at sea either to the consignee by naming him and sending him the bill of lading, or to any person by making the goods deliverable to his order or his assigns and then endorsing and delivering the bill of lading to

such person. A bill of lading which is endorsed in blank is negotiable by delivery only and makes the goods deliverable to the bearer without further endorsement By means of negotiating bills of lading sales and pledges of goods whilst at sea are constantly made, and the shipowner undertakes to deliver the goods to the person who produces the bill of lading properly endorsed although he may not be the original shipper. If he has the bill of lading, *primâ facie* he is the person entitled to delivery of the goods

§ 239. "One of which being accomplished."—The master usually signs two or three duplicate or triplicate bills of lading for each consignment of goods (clause *l*) This occasionally leads to fraud, as the shipper may negotiate one bill of lading to X, and another bill of lading for the same goods to Y However, such frauds are very rare. When they do occur, the rule is that the person to whom a bill of lading for the goods is first negotiated for value gets the property in the goods. Having passed the property to X, the shipper cannot by a subsequent sale pass the property in the same goods to Y But if Y first presents his bill of lading the shipowner is entitled to let him have the goods, unless he knows that there has been a prior transfer to X The shipowner only undertakes to deliver the goods once, and to the first person who comes along with a regular bill of lading In this way Y. may get possession of X's goods Though X. cannot make any claim against the shipowner, of course he can claim the goods from Y

§ 240 The Contract in the Bill of Lading.—The bill of lading shows that the contract entered into by the shipowner with the shipper is to deliver the goods in the like good order and condition in which they were shipped (clause *f*) on freight being paid by the shipper or consignee or his assigns (clause *g*) This contract is itself assignable and passes by assignment of the bill of lading to the person to whom the property in the goods thereby passes, so that such person can sue or be sued on the contract as if he were the original shipper

§ 241. Freight.—When a bill of lading is negotiated,

the liability to pay freight passes with the property in the goods to the consignee or endorsee The original shipper, however, continues liable also, and the shipowner may sue either him or the holder of the bill of lading As in the case of a charter-party, unless otherwise agreed the freight is payable on delivery, and cannot be claimed unless the shipowner has delivered or is ready and willing to deliver the goods The rate or amount of freight is often stated in the margin

§ 242. **Excepted Perils.**—If it were not for the "excepted perils" the shipowner's undertaking, as shown by the bill of lading, would be an absolute one to deliver the goods in the like good order and condition And to protect himself from liability for losses which are outside his control, or for which he will not be answerable, he puts in a number of excepted perils (clause *i*) If the immediate cause of loss or damage to the goods is any one of these excepted perils the shipowner is not liable, and the shipper usually protects himself and the consignee or other holder of the bill of lading by insuring against losses so caused The fact, however, that a loss is caused by an excepted peril does not enable the shipowner to claim freight if in fact the goods have not been delivered

The construction of the various terms used in the clause relating to excepted perils is the same as in the case of charter-parties (see § 231)

§ 243 **Seaworthiness.**—The shipowner impliedly warrants that the ship is seaworthy at the time of sailing He warrants, unless otherwise agreed, not merely that he has done his best to make her seaworthy but that she is so in fact If she is not in fact seaworthy at sailing the shipowner is liable for any loss of or damage to the cargo caused by that unseaworthiness, and the excepted perils do not assist him For instance, if the goods are lost by a peril of the sea, and the loss would not have occurred if the ship had been seaworthy, he is liable for the loss The excepted perils do not, unless clearly expressed so to do, qualify or modify the warranty that the ship is seaworthy As to the meaning of seaworthiness see § 216.

§ 244. Undertaking not to Deviate —As in the case of charter-parties (see § 211) the shipowner impliedly undertakes not to deviate from the proper course of the voyage except to save life, to preserve the ship and cargo, and to the extent expressly permitted by the bill of lading. If he deviates, as by calling at a port not permitted by the bill of lading, he cannot rely on the excepted perils to protect him, even in respect of loss or damage wholly unconnected with the deviation. If he breaks his contract by deviating unjustifiably he becomes a mere common carrier of the cargo, and is liable for any loss of, or damage to, the goods unless caused by an act of God, or the King's enemies, or inherent vice of the goods In the above form of bill of lading the ship is allowed (clause *d*) to call at any port or ports for certain purposes Without this clause such calls would be unjustifiable deviation

§ 245 General Average —Where a voluntary sacrifice is made, or extraordinary expenditure is incurred, for the preservation of the ship and cargo, all who are interested in such preservation must contribute in proportion to the value of the property so saved in which they are interested These claims are called general average contributions When, for example, cargo is thrown overboard to save the ship, or is injured by water in putting out a fire, or sold to raise money to carry out necessary repairs, or when masts or tackle are cut away to right the ship, all parties concerned must contribute to the loss

The parties interested are (1) the shipowner or charterer, who desires to save the ship and earn the freight, and (2) the cargo-owner The master is the one to collect the contributions, but as a rule the amounts to be paid are adjusted at the termination of the voyage by specialists, called average adjustors The shipowner has a lien on the cargo for general average contributions due from the cargo owner, similar to his lien for freight. Certain rules, known as the York-Antwerp Rules, relative to general average are often incorporated in a bill of lading

§ 246. Salvage —Where a ship and cargo are saved from loss or damage by the efforts of another vessel, the

captain and crew of such other vessel are entitled to a payment known as salvage. The ship and the cargo contribute separately, as the ship is not obliged to contribute for the salvage of the cargo, and *vice versa* Where life is saved, the ship or the cargo, or both, if also saved, may have to contribute life salvage Where the amount to be paid cannot be agreed upon, it will be fixed by a judge of the High Court sitting in Admiralty.

§ 247. Bottomry Bonds —Money is sometimes advanced to the master of a ship upon the security of the cargo, upon the condition that it is only to be repaid if the ship reaches its destination safely The document embodying such an arrangement is called a bottomry bond The master has no power to raise money in this way unless no other course is open If, for example, he could borrow on his own personal credit or on that of the shipowner, he is not justified in resorting to a bond The money must be borrowed in the interests of the cargo, *e g* to enable the cargo to be carried in safety the bond, in other words, must be one that is beneficial to the cargo-owner. If communication with the cargo-owner is possible, the master must wait his instructions, but if no instructions are sent within a reasonable time, he may raise the money No more must be borrowed than is necessary, as the nature of the contract necessitates the payment of a high rate of interest

§ 248. Respondentia Bond —A bond charging the cargo with the repayment of money upon the same terms as the ship is charged in a bottomry bond, is called a respondentia bond The same rules as apply to bottomry apply to respondentia, but of course it is the cargo-owner that has to be communicated with Money borrowed on a respondentia bond must be borrowed in the interests of the cargo, *e g* to enable the cargo to be carried in safety

§ 249. Powers and Duties of the Master—Reference has been made in the preceding sections to the acts of the master of a vessel It may be convenient to bring together some of his more important powers

Primarily the master is the agent of the shipowner necessity may make him the agent of the cargo-owner In

the absence of express instructions, the master ought always to communicate with the shipowner or the cargo-owner and take their instructions when this is impossible he can act himself But whatever he does under such circumstances he must be prepared to justify on the ground of necessity, it is not sufficient that he act in good faith

The master of a ship as the agent of the shipowner is bound to do everything necessary to carry out the contract or contracts made between the shipper or shippers and the shipowner From this principle flow both his powers and his duties

As agent of the shipowner the master may—

1 Deviate from the usual course in order to protect the ship and cargo from imminent peril
2 Tranship the goods into another vessel where he is prevented through excepted perils from completing the voyage
3 Throw overboard a part of the cargo in case of necessity
4 Make a salvage agreement on behalf of the ship

As agent of the shipper the master may—

1 Sell damaged goods where this is the wisest course, provided he cannot communicate with the cargo-owner
2 Borrow money on the security of the cargo in case of necessity
3 Make a salvage agreement on behalf of the cargo

§ 250 Authorities —The leading authorities are Carver on *Carriage by Sea* and Mr Justice Scrutton's *Charter-parties and Bills of Lading* See also Abbot on *Merchant Shipping* A shorter account will be found in Mr Payne's *Carriage of Goods by Sea.*

CHAPTER V

BILLS, NOTES, CHEQUES, AND I O U s

§ 251. Negotiable Instruments —The greater number of mercantile transactions are carried out by means of credit. Custom has made usual the use of instruments by which one man instead of paying cash promises unconditionally to pay another a sum of money Such a promise may be transferred from one person to another If A has promised to pay B £100, and B wants to pay C £100, B may hand over A's promise to C, so that A shall pay C directly Bills of exchange, cheques, and promissory notes are transferable from one person to another by mere delivery or by endorsement and delivery (§ 260) All these are "negotiable instruments" A transferee of such an instrument for value may have even better rights than the person from whom he takes it As between the original parties the instrument may be useless either because it has been obtained by fraud, or because there was not consideration for the promise to pay the money But if the person in whose favour the instrument is originally made transfers it for value to some other person, that person is generally able to sue on it (§ 263) This is what is meant by "negotiability"

BILLS OF EXCHANGE

§ 252 Form —A bill of exchange is defined in the Bills of Exchange Act 1882 as "an unconditional order given in writing, addressed by one person to another, signed by

the person granting it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a certain sum in money to the order of a specified person or to bearer" The person who gives the order is called the "drawer," the person to whom it is addressed is called the "drawee," and the person to whom or to whose order the money is to be paid is called the "payee" An order of this kind is often called a "draft" It is really an offer or proposal made by the drawer to the drawee to pay money to the payee or the person to whom he orders that it shall be paid The proposal takes the following form .—

LONDON, *1st January* 1803

£1000

One month after date pay to M N or order One Thousand Pounds

To C. D. A B

If C D, the drawee, accepts this proposal he writes "accepted" across the bill and signs his name, and delivers the bill so accepted to the drawer By so doing he undertakes to comply with the request, and, if there is consideration for his promise, a valid contract arises between the parties A bill so accepted is sometimes called an "acceptance," and the drawee, after acceptance, is called the "acceptor"

If the drawee does not accept the draft he is not a party to the bill The only parties then are the drawer and the payee, and the bill operates as a promise by the drawer to pay the amount to the payee or order, which promise is enforceable if made for valuable consideration. The payee and drawer may be the same person, in which case the request is to "pay to my order" instead of "pay to M N or order" Sometimes bills are made in the form "pay to bearer," or "pay to M N or bearer" And a bill payable to M N or order when endorsed by M N. becomes a bill payable to bearer A 'bearer" is a person in possession of a bill payable to bearer.

§ 253. **Consideration.**—The promise made by the acceptor must, like any other simple contract, be made for valuable consideration Any consideration which will support an ordinary contract will do (see § 101), and further, an antecedent debt or liability will suffice For instance, if C D owes A B £1000, that is sufficient consideration for C. D's promise to A B. to pay that sum to him or to M N, and this is the most usual consideration for an acceptance In the same way as between the drawer and the payee an antecedent debt is sufficient consideration

Moreover, until the contrary is proved, it is always presumed that valuable consideration has been given for a negotiable instrument, and, as we shall see (§ 263), when a bill or cheque is transferred for value the acceptor or drawer is liable to the holder, even though there was no consideration as between the original parties

§ 254. **Inland and Foreign Bills.**—Bills of exchange are either inland or foreign An inland bill is one which is or purports to be both drawn and payable within the British Islands Any other bill is a foreign bill A foreign bill usually consists of a set of three bills, each bill being numbered and containing a reference to the other bills These bills being transmitted separately, the risk of losing the bill is greatly diminished, as any one bill of the set being paid, the other two bills of the set are of no use

The following is a form of a foreign bill —

LONDON, *1st January* 1893

For Rs 550.

At sixty days after sight of this first of exchange (second and third unpaid), pay to the order of C D Five hundred and fifty rupees value received of them, and place the same to account.

To E F. A. B

§ 255 **Stamp.**—A bill, if drawn or made in the United Kingdom, must be stamped with a stamp of proper amount

before execution A bill drawn or made out of the United Kingdom must be stamped by the first person into whose hands it comes in the United Kingdom before it is endorsed, negotiated, or paid Any person issuing, endorsing, transferring, or paying a bill not being duly stamped, is liable to a penalty of £10, and the person taking the bill cannot recover on it.

§ 256 Date —A bill should be dated, but if not dated it is not invalid, as it is regarded as dating from the time it was issued, *i e* from the date of delivery of the bill by the acceptor to the drawer If a bill expressed to be payable at a fixed period after date is undated, the holder may insert the true date of issue

§ 257 The Time for Payment —The parties may, in the bill, fix a time for payment, which may be at the expiration of a given time from the date of the bill, as in the first example above given The time may be fixed with reference to the presentation of the bill for acceptance (as in the example of a foreign bill given above, where "after sight" means "after presentation for acceptance"), or it may be when payment is demanded If no time be fixed, the bill is payable on demand.

Though a bill need not be presented for payment in order to charge the acceptor, it must be so presented to charge the drawer or an endorser (§§ 261-262) If the bill be payable on demand, it should be presented within a reasonable time after its issue, if not payable on demand, then presentment should be made on the day it is due, three days of grace being added to the time of payment, the bill being regarded as due on the last of these days If the last day of grace falls on Sunday, Christmas Day, or Good Friday, the bill is payable on the previous day, if the last day is on a bank holiday (other than Christmas Day and Good Friday), or if the last day of grace is a Sunday, and the previous day is a bank holiday, the bill is payable on the succeeding business day

§ 258 The Place of Payment —It is desirable that the parties should specify the place of payment If no place be specified, but the acceptor's address is given in the bill,

it is payable at such address The acceptor may fix the place of payment when accepting, but in order to do so he must not only accept the bill to pay at a particular place, but state that it is to be paid there and nowhere else

If no place of payment or address be given in the bill, the place of payment is the place of business of the acceptor, if known, but if not known, then his ordinary residence If neither his place of business nor his ordinary residence be known, the place of payment is wherever he can be found, or his last known place of business or residence

§ 259 **Acceptance**—If the person to whom a bill is presented for acceptance accepts it, he does so by writing across it "Accepted, C D," or "Accepted, payable at ——, C D" He may qualify his acceptance in other ways, but the holder need not take a qualified acceptance, and if an unqualified acceptance is refused may treat the bill as non-accepted. A bill may be presented for acceptance at any time, even after it has been negotiated, and after it is overdue, or it may (except in certain special circumstances) never be presented for acceptance at all If C. D accepts the bill he thereby engages that he will pay it according to the tenor of his acceptance He then becomes the party primarily liable to the holder, and the drawer and other parties are only liable if he dishonours the bill by non-payment If the drawee refuses to accept the bill, the bill is said to be dishonoured by non-acceptance The holder must then at once give notice to the drawer and every endorser in order to make them liable on the bill When a bill is payable "after sight," presentment for acceptance is necessary in order to fix the maturity of the instrument. When a bill that need not be presented for acceptance is not presented for acceptance, the drawer and endorsers are liable to the holder

§ 260 **Transfer**—A bill of exchange may be transferred by the holder unless it contains words prohibiting any transfer A bill payable to bearer is transferred by delivery a bill payable to order is transferred by endorsement of the holder, followed by delivery The holder of a bill may endorse it generally or specially If he merely

writes his name on the back, the endorsement is general and the bill is then payable to bearer and transferable on mere delivery until some other holder subsequently endorses it specially If the holder writes on the back, "Pay to X Y or order," and then signs, the bill is specially endorsed and requires to be endorsed by X Y before it can again be transferred A bill may be transferred an indefinite number of times Every person who transfers it by endorsement is an endorser, and the person to whom he transfers it is a holder until he again transfers it to another holder

§ 261. Position of the Drawer —Where the amount is payable to the drawer, he has only to receive the amount. But if the amount is payable to a third party, the drawer, in case the bill be not paid by the acceptor, is liable to pay the amount to the third party or the holder The drawer may also, by endorsing a bill, become liable to the holder His liability, however, is in every case subject to the conditions that the bill be presented for payment, and that if not paid, notice of such non payment (called notice of dishonour) be duly given to him Presentation of the bill for payment, though, as we have seen, it cannot be required by the acceptor, is all-important as regards the position of a third party, into whose hand the bill comes. A holder (other than the drawer) cannot, in case of non-payment by the acceptor, make the drawer liable unless he has presented the bill for payment to the acceptor Not only must the holder present the bill for payment to the acceptor, but if it is dishonoured he must give to the drawer notice of dishonour Such notice must be given within a reasonable time If the parties live in the same place, the notice should reach the drawer the day after the day of dishonour if the parties live in different places, notice should be posted the day after the day of dishonour

§ 262 Position of an Endorser.—Every person who has transferred a bill by endorsement is liable on the bill to every subsequent holder, if the bill is dishonoured by non-payment or non-acceptance If one endorser is made to pay the holder, he may in turn sue any prior endorser So that the holder looks not only to the acceptor and drawer

but to every person whose name is endorsed on the bill But a holder of a bill payable to bearer who transfers without endorsement incurs no liability to any subsequent holder

§ 263. **Position of the Holder.**—The holder is the person in possession of the bill The law presumes that a bill is given for a sufficient consideration, but it is open to any party sued on a bill to show that there was no consideration given For example, if A by way of doing B a favour accepts a bill drawn by B., and B brings an action against A, it is open to A to show that B gave him no consideration for the bill, and in such a case B cannot recover If, however, the holder took the bill before it was overdue, in good faith, and gave value for it, and had no notice of any defects in title, he is a "*holder in due course*," and it will be immaterial that the bill was originally given without consideration, or that it was obtained or negotiated by fraud Moreover, if once a bill has got into the hands of a holder in due course, any subsequent holder who derives his title from the holder in due course has all the rights of that holder, provided he has not himself been party to any fraud or illegality In order to protect himself, the holder must be careful to present the bill when due at the proper place, and if it be dishonoured, to give notice to the drawer and every endorser In the case of a foreign bill the dishonour should be noted by protest The protest should be made by a notary public at the place where the dishonour occurs The protest is a solemn declaration signed by the notary containing a copy of the bill and specifying amongst other things the reason of protesting, and place and date of protest, as well as the name of the person at whose request the bill is protested The protest will be good evidence of the dishonour of the bill in case an action is brought in a foreign court

§ 264. **Example.**—An example summing up the different rules may now be given.

D is the drawer

A the acceptor.

P the payee.

E the person to whom P transfers the bill

H the person to whom E. transfers the bill

H becomes the holder, and if the bill has been transferred by endorsement and delivery, P and E are endorsers

A is bound to pay the bill whether it be presented or not

D is bound to pay H., the holder, if A does not pay, provided H. has presented the bill for payment and has given D notice of non-payment

E is also liable to pay H in case of non-payment by A, provided the bill was duly presented for payment and notice of dishonour given to him

H, if not paid by A, may proceed against either A, P, D, or E, provided he has presented the bill for payment and given notice of dishonour, but he can only recover the amount of the bill and the costs to which he has been put. He may sue all parties at one and the same time.

CHEQUES

§ 265. **Definition**.—A cheque is an order given to a bank by a customer requesting the bank to pay a sum of money to the person named, or his order, or to the bearer on demand [1]

A cheque differs from a bill of exchange in several points

A bill requires to be accepted in order to charge the acceptor, a cheque is never accepted by a bank, and the holder has no remedy against the bank in case of dishonour A bill must be presented for payment in due time, otherwise the drawer is discharged, failure to present a cheque in due time does not discharge the drawer unless the bank fails. Notice of dishonour to the drawer is rarely necessary, as the want of effects in the banker's hand is the usual cause of dishonour, and this excuses notice.

[1] The Bills of Exchange Act 1882 defines a cheque as a bill of exchange drawn on a banker payable on demand

§ 266. **Crossing—"not negotiable."**—It is not unusual to draw across a cheque two parallel transverse lines with or without the words "*and Co*" This is called "crossing," and constitutes a direction by the drawer to his bank to pay the cheque only when it is presented for payment by another bank If a bank be specified, payment can be obtained only through that bank

The words "*not negotiable*" may also be written across a cheque Where a crossed cheque bears the words "not negotiable" the holder takes no better title than the person had from whom he took it So that if a "not negotiable" cheque be stolen or affected with fraud, a subsequent *bona-fide* holder for value has no better title than the thief or person party to the fraud had

The holder of an uncrossed cheque may cross it, and the holder of a crossed cheque may add the words "not negotiable"

§ 267. **Duty of Bank.**—A bank is bound to honour a customer's cheques so long as there is a balance to the credit of such customer's account. This results from the implied contract entered into between the bank and the customer when an account is opened. Notice of the death of a customer determines the authority of a bank to pay cheques drawn by such customer before his death

§ 268. **Presentation of Cheques**—A cheque should be presented for payment within a reasonable time, that is, generally, on the day after its receipt If there is delay in presentment, and the drawer suffers any damage thereby, as by the failure of the bank, the drawer is discharged to the extent of such damage

Promissory Notes and I O U s

§ 269. **Promissory Notes**—A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person or to bearer Delivery of the note by the maker to the other

person is essential to make the note complete, and the note must be stamped with the proper stamp before execution A promissory note is negotiable by delivery if payable to bearer, or by endorsement and delivery if payable to order, like a bill of exchange. The following is a form —

LONDON, *1st January* 1893

£100

On demand [*or* at sight, *or* days after sight, *or* days after date, *or* on the day of] I promise to pay C D [*or* C D or order, *or* C D. or bearer, *or* bearer] one hundred pounds A B

A bank-note is an example of a promissory note in which the promise is given by a bank

If it is in the body of it made payable at a particular place it must be presented at that place for payment, otherwise no presentment for payment is necessary to charge the drawer, but presentment is always necessary to render an endorser liable

§ 270 I O.U.s —An I O U is a mere acknowledgment of a debt It is not a negotiable instrument and requires no stamp If, however, there is also a promise to pay the money, it must be stamped as a promissory note.

The following is the usual form —

1st January 1893.

A. B.

I.O U. £100.

C. D

§ 271. Authorities —The law relating to bills of exchange has been embodied in The Bills of Exchange Act, 1882 Byles on Bill, and Chalmers on Bills, contain the Act with notes Mr Jacob's *Short Treatise on Bills of Exchange, Cheques and Promissory Notes* is an excellent short treatise for students *The Law of Banking*, by Sir John Paget, K C., can be recommended to those engaged in banks

PART IV

BANKRUPTCY

§ 272. **Principle involved.**—The law of bankruptcy is based on the principle that if a person is unable to pay his debts in full, his property should be taken to satisfy his creditors as far as it will go, he himself being discharged from any further liability in respect of such debts. The first English statute on the subject was directed against fraudulent debtors Subsequently bankruptcy was restricted to traders, but now any person (with some exceptions), whether a trader or not, may be made a bankrupt

§ 273. **The Board of Trade.**—The Board of Trade is entrusted with very important powers and duties in all cases of bankruptcy. All moneys received by a trustee are paid into an account kept by the Board with the Bank of England, called "The Bankruptcy Estates Account," except when the committee of inspection (§ 283) or the Board of Trade think it desirable to have the money paid to a local bank Any local account has to be kept in the name of the debtor's estate.

The Board of Trade appoints the official receivers (§ 278) and other officers It has also power to issue general orders of an administrative character, and may alter the form of all official documents not of a judicial nature

§ 274. **Acts of Bankruptcy.**—Proceedings in bank-

ruptcy are commenced by a creditor presenting a petition in the proper court alleging that the debtor has committed an "act of bankruptcy" The following are acts of bankruptcy.—

1 When he assigns his property to trustees for the benefit of his creditors generally, or

2. Where he makes a fraudulent conveyance, gift, or transfer of his or any part thereof

3 Where he assigns his property or part thereof, or creates any charge with the object of fraudulently benefiting one or more of his creditors at the expense of the others

4 Where the debtor with intent to defeat or delay his creditors departs out of or remains out of England, or departs from his dwelling-house, or otherwise absents himself

5 Where he permits an execution to be levied by seizure of his goods under a process in an action in any court, and the goods are sold or held by the sheriff for twenty-one days

(When judgment is recovered in an action, if the amount claimed be not paid, the creditor issues execution, *i e* he sets the sheriff in motion, and the sheriff seizes the goods of the debtor, and holds them until the debt is paid or sells them)

6 Where he files in court a declaration of inability to pay debts or presents a bankruptcy petition against himself

7. Where he does not comply with a bankruptcy notice, *i e* a notice requiring him to pay a final judgment obtained by a creditor

8 Where the debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts

§ 275 Who may be made Bankrupt —With few exceptions any person may be made a bankrupt A married woman who carries on a trade or business (whether separately from her husband or not) may be made a bank-

rupt as if she were a single woman An infant, however (*i.e* a person under twenty-one years of age), cannot be made a bankrupt

§ 276. **Who can petition**—A person may petition to have himself adjudicated a bankrupt, but as a rule a petition is presented by a creditor who cannot obtain payment of his debt The following conditions must be fulfilled in order to enable a creditor to petition —

(*a*) The debt due must be at least £50

(*b*) The debt must be a liquidated sum That is a sum of ascertained amount, not a claim for damages of uncertain amount

(*c*) The debt must be payable immediately or at some certain future time

(*d*) The act of bankruptcy must have occurred within three months before the presentation of the petition

(*e*) The debtor must be domiciled in England, or within a year before the presentation of the petition have ordinarily resided or had a dwelling-house or place of business in England, or have carried on business personally or by an agent in England, or been a member of a firm which has carried on business in England.

§ 277. **Order of Adjudication.**—When the petition is presented by a creditor, the court requires proof of the debt and of the act of bankruptcy It must also be shown that the debtor had notice of the petition If the court is satisfied that an act of bankruptcy has been committed, it will make a "receiving order," which has the immediate effect of making the "official receiver" the receiver of all the property of the debtor, with certain exceptions, and deprives the creditors of power to bring any actions against the bankrupt for their debts except with the leave of the court

§ 278. **The Official Receiver**—The Board of Trade has appointed a number of official receivers, who have important duties to discharge The debtor is always examined by an official receiver, who makes a report to the

court on the debtor's conduct, and especially as to whether the debtor has done any act that would justify the court in refusing, suspending, or modifying an order for discharge (§ 289)

Pending the appointment of a trustee (§ 282) or special manager, he has charge of all the property of the debtor, he summons and presides at meetings of creditors, and he makes a report to the creditors on any proposal of the debtor regarding the payment of the debts

§ 279. Special Manager.—Where it is necessary in the interests of the estate that a special manager should be appointed, the official receiver may, on the application of any creditor, appoint a special manager to act until a trustee is appointed The special manager has to give security for the performance of his duties, and may be removed by the official receiver The creditors may require his removal. If it is necessary for the special manager to raise money to carry on the business, he must get the assent of the official receiver

§ 280 Public Examination of the Debtor.—When the court makes a receiving order, it appoints a day for the examination of the debtor, and the debtor is required to attend The debtor is also required to furnish the official receiver with a statement of affairs showing the particulars of the debtor's liabilities, debts, and assets, the names and addresses of the creditors, the securities (if any) held by them, and any other information the official receiver may require At the public examination questions may be put by the official receiver or by any creditor who has tendered a proof of a debt (§ 284) The evidence of the debtor is taken on oath, and the examination cannot be declared closed until after the first meeting of creditors

§ 281. First General Meeting.—Within fourteen days after the receiving order is made, a general meeting of creditors, at which the debtor must be present, is called by the official receiver Each creditor is entitled to have sent him a summary of the debtor's statement of affairs, accompanied by any observations the official receiver may think fit to make The creditors at this meeting may resolve

that the debtor be adjudged a bankrupt, or may agree to accept a scheme put forward by the debtor (§ 293) The resolution in favour of bankruptcy must be carried by a majority "in value" of the creditors present, personally or by proxy, *i e* each vote is estimated at the amount of the debt due to the voter The court will subsequently adjudge the debtor bankrupt, and thereupon his property becomes available for the payment of his debts

§ 282. **The Trustee.**—When the creditors have resolved that the debtor be adjudged bankrupt, the creditors may appoint a fit person to be trustee of the property of the bankrupt, or they may leave the appointment to the committee of inspection (§ 283) Until the trustee is appointed the official receiver acts as trustee If the creditors do not appoint a trustee, the Board of Trade may appoint, but a trustee subsequently appointed by the creditors will displace the trustee appointed by the Board of Trade

On his appointment all the property of the bankrupt passes to the trustee. The chief duties of the trustee are to take possession of, or get in, all the debtor's property liable for payment of his debts, to keep books and accounts, to pay into the Bank of England all moneys received, and to declare and pay dividends from time to time

The chief powers of the trustee are to get in all the property of the bankrupt, to sell any part of such property, to hold property, to make contracts, to give receipts, to prove in bankruptcy when the bankrupt is a creditor, and to summon meetings of the creditors He has certain other powers which he can exercise only with the consent of the committee of inspection.

§ 283 **The Committee of Inspection.**—The creditors may appoint a committee of their own number qualified to vote, of not less than three and not more than five, to be a "committee of inspection" The duty of such committee is to superintend the administration of the bankrupt's estate by the trustee, and to give directions to the trustee subject to the views of the creditors assembled in general meeting

The committee are entitled to see the record and cash books kept by the trustee, and once in every three months

are to audit the cash-book. The trustee requires the consent of the committee to employ a solicitor, to mortgage the property of the bankrupt, to carry on the business, to sue for debts, to refer disputes to arbitration, to compromise any debt or claim between the bankrupt and third parties, to compromise debts and claims provable, or to divide property amongst the creditors in specie

§ 284 **Proof of Debts** —Before a claim is admitted against the estate of the bankrupt, the creditor must prove it by sending to the official receiver an affidavit or sworn declaration that the debt is due, full particulars of such debt being given The official receiver hands over all proofs to the trustee to examine Within twenty-eight days after receiving a proof, the trustee must state in writing whether he admits or rejects it A creditor whose proof is rejected may appeal to the court, and when a proof is accepted the trustee, and in some cases a creditor, may ask the court to expunge it Only debts proved are entitled to be paid out of the assets, and, as a rule, only creditors who have proved their debts can vote at meetings

§ 285 **Secured Debts** —A creditor may have his debt "secured" For instance, the debt may be £1000, and the creditor may have a mortgage on part of the debtor's property. When a secured creditor proves his debt, he must give particulars of the security he holds and state its value The trustee may call on the creditor to give up his security for the benefit of the estate, on being paid its estimated value with an addition of 20 per cent. At meetings he is entitled to vote only in respect of the balance, if any, due to him after deducting the value of the security. Suppose, for example, in the above case the mortgage is only worth £750, then the creditor's voting power is represented by £250

§ 286 **Property available for paying Debts** —The property of a bankrupt divisible among his creditors does *not* include (*a*) property held by him on trust for any other person, or (*b*) the tools of his trade and the necessary wearing apparel and bedding of himself, his wife, and children, to a value not exceeding in all £20

Subject to the above exceptions the property of a bankrupt divisible among his creditors comprises (among other things) the following —

1. All property belonging to the bankrupt at the commencement of the bankruptcy
2. All property acquired by, or devolving on, him before his discharge, except wages earned by him by his mere personal labour so far as they are reasonably necessary for the maintenance of himself and his family And when a bankrupt is in receipt of a salary, a portion of it only is usually applied to payment of the debts
3. All goods belonging to any other person, but which at the commencement of the bankruptcy are in the possession, order, or disposition of the bankrupt under the following conditions —

The goods must be in his order or disposition—

(*a*) In his trade or business,

(*b*) By consent of the true owner,

(*c*) Under such circumstances that the bankrupt is the reputed owner

The principle on which such goods are made liable is that persons are led to give credit to the bankrupt because he is supposed to be owner of the goods

4. Property that the bankrupt has professed to assign away to others previous to the bankruptcy, fraudulently or without consideration, unless such assignment is by way of marriage settlement, or is a settlement of property which the bankrupt has acquired in right of his wife. Where property is conveyed by a person who receives no consideration for it, and such person becomes bankrupt within two years, the trustee may recover the property for the creditors, and if he becomes bankrupt within ten years from the date of the conveyance, the trustee can recover the property, unless the bankrupt shows that at the time of the conveyance he was perfectly solvent Any settlement of property out-

side of such ten years may be set aside if it was fraudulent, *i e* made to delay or defeat creditors

§ 287. Disclaimer of onerous Property.—If any portion of the bankrupt's property is burthened with onerous covenants, or consists of stocks or shares in companies, or of unprofitable contracts, or of any other property that is unsaleable by reason of its binding the possessor to the performance of onerous acts, the trustee may, instead of accepting the same, disclaim it, and thereupon he is discharged from any liability in respect of the property A lease, for example, binds the lessee to pay rent, to repair, to insure, etc, and the trustee who accepts the lease will find himself bound to perform all these covenants The disclaimer must take place within three months after the trustee is appointed, or within two months after he first becomes aware of the existence of the property In the case of leases, the consent of the court is necessary for disclaimer, except in certain cases

§ 288 Payment of Dividends —The first charge on the estate of a bankrupt is the expense of administering the estate, and it is the duty of the trustee to retain out of the assets an amount sufficient to meet such expense Subject to this, the trustee is required to declare and distribute dividends amongst the creditors who have proved their debts

The first dividend should be distributed within four months after the conclusion of the first meeting of creditors, unless the committee of inspection are satisfied that there is good ground for postponing such distribution Subsequent dividends are to be declared and distributed at intervals of not more than six months

When all the property has been realised, a final dividend is declared Notice of the intention to pay a final dividend is given to those creditors who have not established their claim, and if they fail to establish their claim to the satisfaction of the trustee within a fixed time, they are excluded from the distribution

§ 289 Discharge of Bankrupt —A bankrupt may at any time apply to the court for his discharge. The court,

on hearing the application, will take into account the report of the official receiver on the conduct of the bankrupt In this report the official receiver is required to state whether the bankrupt has committed any act that would justify the court in refusing, suspending, or qualifying the order of discharge The court is bound to refuse the discharge if any criminal act in connection with the bankruptcy has been committed, and it is bound, except where for special reasons it otherwise determines, either (*a*) to refuse the discharge, or (*b*) to suspend it for not less than two years, or (*c*) to suspend it until a dividend of at least 10s in the £ be paid, or (*d*) to require the bankrupt to consent to judgment being entered against him for any balance of debts not paid at the date of the discharge, such balance to be payable out of future earnings, in the following cases (amongst others) —

1 Where the assets are not sufficient to pay 10s in the £, unless this is due to circumstances for which he is not responsible (if this is the only ground the discharge may be suspended for a period less than two years)
2 Where he omitted to keep proper books of account during the three years preceding his bankruptcy
3 Where he continued to trade knowing he was insolvent
4 Where he contracted a debt without having reasonable ground of expectation of being able to pay
5 Where he has failed satisfactorily to account for any loss of assets or any deficiency of assets to meet his liabilities
6 Where the bankruptcy was due to rash and hazardous speculation, or to unjustifiable extravagance in living
7 Where he put any creditor to unnecessary expense by a frivolous or vexatious defence to an action
8 Where within three months of his bankruptcy he has incurred unnecessary expense by bringing a frivolous or vexatious action
9 Where he, within three months of the date of the receiving order, being unable to pay his debts as

they became due, gave an undue preference to any of his creditors

10 Where he has been bankrupt previously, or made a composition with his creditors

11. Where he has been guilty of any fraud or fraudulent breach of trust

§ 290. *Effect of an Order of Discharge*.—The order of discharge releases the bankrupt from all debts provable in the bankruptcy, with certain exceptions, such as debts due to the Crown, or debts incurred by fraud to which he was a party. In respect of all discharged debts no action can be brought against him The discharge will not affect his liability to any criminal prosecution, and he is liable to be prosecuted for any of the offences mentioned in the Bankruptcy Acts

§ 291. Disabilities of a Bankrupt.—Bankruptcy disqualifies the bankrupt from being appointed or acting as a justice of the peace or being elected to holding or exercising the office of mayor, or alderman, guardian or overseer of the poor, or being a member of a borough, county, district, or parish council He cannot sit, vote, or be elected to the House of Lords or the House of Commons If a member of the House of Commons becomes bankrupt, and the disqualification is not removed within six months, the seat becomes vacant These disqualifications cease (1) where the adjudication of bankruptcy is annulled, (2) when the court, on granting his discharge, certifies that the bankruptcy was caused by misfortune without any misdemeanour on his part

An undischarged bankrupt is guilty of an offence and may be punished if he obtains credit to the extent of £10 or upwards from any person without informing such person that he is an undischarged bankrupt, or engages in any trade or business under a name other than that in which he was adjudicated a bankrupt without disclosing the fact

§ 292 Annulment of Adjudication.—The court will always annul an adjudication where the order ought not to have been made, and if a debtor pays his debts in full, or the creditors accept a scheme of arrangement, the adjudication may be annulled.

All acts done by the official receiver or trustee previous to the annulment are valid

§ 293 Composition or Scheme of Arrangement.—Before the court orders a person to be adjudicated a bankrupt, the creditors may agree to a scheme of arrangement of the debtor's affairs The debtor may, for example, offer to pay by instalments 10s or 15s in the £ to his creditors, and may give security for payment of the same If such scheme be accepted, the receiving order will be rescinded The resolution accepting the scheme must be adopted not only by a majority in number, but by three-fourths in value of the creditors present, personally or by proxy, and voting at the meeting, and be subsequently confirmed by a resolution passed by a majority in number representing three-fourths in value of all the creditors who have proved and been approved by the court Before the court will give its approval the official receiver must make his report on the scheme. After approval the receiving order is rescinded, and the debtor is put into possession of the property. A composition or scheme duly accepted and approved binds all the creditors, so far as any debt provable in bankruptcy is concerned, but it does not release the bankrupt from liability in certain cases, *e g* under a decree against him as co-respondent in a divorce suit, unless the court makes an order to that effect

After a man is adjudicated bankrupt, the creditors may resolve to adopt a scheme of arrangement, and if such scheme of arrangement be approved by the court, the court may annul the bankruptcy

§ 294. Private Arrangements with Creditors.—A debtor may arrange with his creditors privately that each shall accept part payment in satisfaction of the whole debt due. Such an arrangement only binds those creditors who are parties to it It is not necessary that the agreement should be under seal, inasmuch as the forbearance of each to sue is a consideration sufficient to make the agreement a binding contract Usually a deed is prepared by which, in consideration of the payment of a composition, the creditors release and discharge the debtor from the debts

due It is important that all the creditors should join If one refuses, he may take bankruptcy proceedings, inasmuch as the making of the composition is an act of bankruptcy (§ 274). If bankruptcy ensue, the deed takes no effect A Deed of Arrangement is void unless it is registered and before or within twenty-one days after registration is assented to by a majority in number and value of the creditors

§ 295. **Authorities.**—Mr. C. L Hardy's *Law and Practice of Bankruptcy* is a short treatise intended for students and business men Larger works are Mr. Ringwood's *Principles of Bankruptcy*, and Mr Manson's *Short View of the Bankruptcy Law* The best known complete treatise is *The Law and Practice in Bankruptcy*, by Sir Roland L. Vaughan Williams

PART V

THE ENFORCEMENT OF LAW

CHAPTER I

ACTION AND ARBITRATION

§ 296. **Introductory**—Disputes arising out of commercial transactions may be settled either by action in a Court of Law or (if the parties to the dispute consent) by Arbitration In the High Court a special Judge is assigned for the trial of commercial cases, and there are facilities for bringing them to trial speedily Actions in which the matter in dispute does not exceed £100 may be tried in a County Court And the Mayor's Court has jurisdiction to try all cases arising in the City of London

§ 297. **Damages.**—Every breach of contract entitles the party whose contract is broken to bring an action in a court of law. If he has suffered no actual loss or damage by the breach of contract, he will only get a judgment for nominal damages For instance, if a merchant who has contracted to deliver goods at a certain price does not deliver them, there is a breach of contract The purchaser may be able to buy the same goods immediately at the same or a lower price If he can he suffers no actual damage by the breach of contract Still he can recover a nominal sum, say one shilling, as damages for the wrong the other party has done in breaking the contract. But if he has suffered actual loss

or damage he can recover substantial damages If, for instance, the price of the goods has risen, and he has accordingly to buy other goods at a higher price in place of those which the defendant has failed to deliver, he will recover the difference between the contract price and the market price But an injured party cannot always recover as damages all the loss he actually suffers by a breach of contract He can recover such damage as in ordinary circumstances would result, or might naturally be expected to result, from the breach of contract Thus in the example given he can recover the difference between the market price and the contract price, as in ordinary circumstances this is the loss he would suffer. If there are any special circumstances he must make them known to the other party at the time of making the contract. If, for instance, he wants the goods for some special purpose and depends on them, say, to carry out a contract with some third person, a breach of which will involve him in a claim for heavy damages, he should warn the seller at the time of making the contract The seller then knows the risk he runs, and will act accordingly. If he has given the other party notice of the special circumstances he can recover damages for the special loss occasioned thereby but not otherwise

§ 298 **Mitigating the Loss.**—A party who has suffered by another's breach of contract must do all he reasonably can to mitigate the loss, and must not inflate it by anything he does or neglects to do He must generally act as a reasonable man would if he had to bear the loss himself, and may charge the defendant with the cost of doing what in the circumstances is reasonable to mitigate the loss So if goods which are wanted for a particular purpose are not delivered, the purchaser should buy others of the same kind, or the best substitute he can get, if they can be procured at a reasonable price, and may charge the defendant with the difference But he would not be justified in procuring other goods at such an exorbitant price that the extra cost would be greater than the loss he would suffer by doing without them

§ 299. Specific Performance and Injunction.—Sometimes in addition to giving damages, or instead of doing so, the court will order the defendant to perform the contract by making a decree for specific performance, or will grant an injunction restraining him from committing a threatened breach. And where goods have been wrongfully detained the court has power to make an order that they shall be given up to the person entitled to them.

§ 300. Arbitration.—The parties to a dispute may agree to submit their differences to arbitration. If they so agree in writing, either when the contract is made or after disputes have arisen, the court will usually, on the application of either party, restrain the other party from proceeding by action. Sometimes the parties may agree that the dispute shall be settled by a single arbitrator named in the agreement or to be chosen by some named person. A more common arrangement is for each party to appoint an arbitrator, and for the arbitrators to appoint an umpire if they cannot agree. It often saves much expense to refer a dispute to a skilled arbitrator, who can decide very quickly such questions as whether goods are according to sample. An award of an arbitrator may be enforced as a judgment, and though the courts have power to set it aside, they rarely do so except on the ground of misconduct on the part of the arbitrator. If questions of law arise, the arbitrator may state a case for the opinion of the court, but if this is not done, the award cannot be set aside on the ground that the arbitrator has made a mistake in law.

An arbitrator has power to take evidence on oath, and he should in all cases proceed judicially and not make his award without hearing the parties, or at least giving them notice of the time and place when they can be heard. He may award costs to the successful party.

CHAPTER II

THE APPLICATION OF LAW

§ 301. **Introductory**—It has hitherto been assumed that all commercial disputes in England are governed by English law. As a general rule, the laws of a state apply to all persons and to all transactions within the state. But cases often occur where mercantile transactions are entered into in one country, but are to be performed in another country. For instance, A and B enter into a contract in England that is to be performed in France. Suppose a breach of this contract to take place, and an action for damages to be brought in England, is the validity and construction of the contract governed by English or by French law?

Prima facie the law of the place where the action is brought will be applied by the courts, but as a matter of commercial convenience every civilised country recognises and enforces to some extent the laws of other states.

§ 302. **What is Foreign Law?**—By foreign law is meant not merely the laws of foreign states, but the laws of different parts of the Empire. Scotland, the Channel Islands, and in a less degree Ireland, have different laws from England. Each of the colonies has its own system of law. Scotch, Irish, and colonial law is, in England, regarded as foreign law.

§ 303. **Land**—Land is always subject to the law of the place where it is situated. Such law governs—

1. The legal incidents that attach to its ownership;

2. The capacity of the owner to transfer it, as well as the form of transfer,
3 The capacity of the owner to leave it by will, the formalities of the will, as well as the effects of the will on the land;
4. The devolution of land in case the owner dies without making a will

Hence if an Englishman buys land in France, such land will in all important respects be governed by the law of France.

§ 304 **Contracts relating to Land**.—Contracts relating to land, as we have seen, are governed by the law of the state where the land is situated The word land includes all interests in land, including leases for terms of years, though these are personal property according to English law The purchaser of land in a foreign country must therefore be careful to see that he observes the rules relating to the transfer of land in such country, otherwise he will not obtain a good title He must also remember that he cannot dispose of such land except in accordance with the law of the foreign state If, for example, the land be in France and the owner die intestate, the land will not descend to the eldest son, according to English law, but will be divided amongst all the children, according to French law

§ 305. **Moveable Property.**—The term "moveables" or "moveable property" is used in questions of conflict of jurisdiction to denote goods and chattels, *i.e* all personal property other than interests in land and choses in action As regards such property the law of the "domicile" of a man at the time of his death determines—

1 His capacity to make a will, the formalities of the will, and the legal effects of the will,
2. The person who is to take out letters of administration in case of intestacy, and how the property is to be divided

§ 306 **Domicile**—Reference has been made to the law of the domicile Two elements are required in domicile (1) actual residence in a country, and (2) an intention to remain

permanently in such country. If an Englishman goes to France, and hires a house for twelve months, intending to return to England, he does not acquire a French domicile, but if he takes the house intending to reside permanently in France, then he acquires for the time being a French domicile, even though he should subsequently change his mind and return to England

Every man at his birth acquires the domicile of his father, and such domicile remains until he acquires a new one

§ 307 **Contracts relating to Moveables** —As a general rule, a contract relating to moveable property is valid everywhere if valid by the law of the place where the contract is made A contract is regarded as being made in the place where the offer is accepted The validity of the contract may be considered in detail with reference to (*a*) capacity to contract; (*b*) formalities, (*c*) rights and liabilities, and (*d*) performance

(*a*) *Capacity to Contract*—It is doubtful in the case of mercantile contracts whether the capacity of the parties is to be referred to the law of the place where the contract is made or to the law of the domicile The older authorities adopt the former rule, whilst the modern English authorities tend to adopt the latter law, referring all questions of capacity to the law of the domicile of the party

(*b*) *Formalities of the Contract — Prima facie* the formalities required are those of the country in which the contract is made, but there is nothing to prevent Englishmen abroad from entering into contracts according to the formalities required by English law, provided it appears that the parties contracted with reference to such law In other words, the formalities of a contract depend on the law contemplated by the parties, but in the absence of any evidence to the contrary, the parties are presumed to contract with reference to the law of the place where the contract is entered into

The formalities of a contract must be distinguished from procedure in an action and the evidence required to prove a contract in a court of justice The rules that govern procedure and evidence are those embodied in the law of

the country where legal proceedings are taken Hence, if an action be brought in England on a foreign contract that by English law is not enforceable unless there is some note or memorandum in writing of the terms (see § 99), the action will fail if there be no such writing; such written evidence must be given, though it is not required by the law of the place where the contract is made And the English Statutes of Limitations, which relate to procedure, are applicable to actions brought on foreign contracts

(*c*) *Rights and Liabilities*.—The rights and liabilities of the parties depend on the law contemplated by the parties, but there is a *prima facie* presumption in favour of the law of the place where the contract is made A., a merchant in London, sold to B, another merchant in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port. Default was made in delivery, and B. brought an action for damages against A It was urged that as the contract was to be performed at Algiers, the French law, which is the law of Algiers, applied, and under that law A would not have been liable. The court held that as the contract was made in England, and as there was no evidence that the French law was contemplated by the parties, the liability of A was to be governed by English law "What is to be the law by which a contract, or any part of it, is to be governed or applied, must always be a matter of construction of the contract itself, as read by the light of the subject-matter and of the surrounding circumstances . . . the broad rule is that the law of the country where a contract is made presumably governs the nature, obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties"

Charter-parties and bills of lading are exceptions to the rule The rights and liabilities of the parties are governed by the law of the flag, *i e* the law of the country to which the ship belongs

§ 308. **Bills of Exchange.**—A bill of exchange may be drawn in one country and be accepted, negotiated, or made payable in another. The Bills of Exchange Act 1882

contains the following rules relating to the validity in England of such bills —

(*a*) As far as form is concerned, the bill will be valid if the law of the place of issue be followed

(*b*) The absence of a stamp required by the foreign place of issue will not invalidate the bill

(*c*) The duties of the holder, in presenting for acceptance or for payment, or in protesting, or in giving notice of dishonour, are determined by the law of the place where the act is done, or the bill is dishonoured

(*d*) An acceptance or endorsement is valid if made according to the law of the place where the bill is accepted or endorsed

(*e*) Where a bill is drawn in one country and payable in another, the due date thereof is determined according to the law of the place where it is payable.

§ 309. Foreign Judgment —In some cases it may be necessary to bring an action in another country Suppose judgment for payment of a sum of money is obtained, but the defendant's property is in England, can the foreign judgment be enforced in England? If the defendant had an opportunity of defending, and the foreign judgment was a final one, and the foreign court had jurisdiction in the case, the party who obtained judgment in his favour may bring an action in England to enforce it All that he requires to prove is that the foreign court had jurisdiction, and that the judgment was a final one. He will then obtain judgment of an English court for payment of the money, which judgment can be enforced by execution upon his property in this country

Instead of adopting this mode of procedure, the plaintiff may bring an action on the original cause of action apart from the foreign judgment.

§ 310. Authorities —*Private International Jurisprudence*, by Mr. J A. Foote, K.C ; *Private International Law*, by Professor J. Westlake

APPENDIX

PROPOSAL FOR LIFE INSURANCE

If any change has taken place in the Name it should be stated	Name, Residence, Profession or Occupation of the Person whose Life is to be Assured?	
Proof should be furnished in order that the Policy may be Indisputable.	Place and Date of Birth?	
	Has the Life been proposed to any other Office? If so, name the Office and the result of the Proposal?	
	Name and Residence of usual Medical Attendant, how long has he known you?	
	Name and Residence of any other Medical Gentleman consulted within the past seven years?	
If no Medical Attendant a second Private Reference should be named.	Name and Residence of an intimate Private Friend, how long has he known you?	
	Sum to be assured? With or without Profits? Term for which Assurance is required?	
This question need only be answered when the Proposal is on the life of another person.	Name, Residence, and Occupation of the Person in whose favour the Policy is to be granted?	

I declare the above statements are true, that the Private and Medical Referees named are competent to give information as to past and present state of health and habits of life, and I agree that such Statements, together with those made, *or to be made to the Medical Officers of the Society and signed* by me, shall be the basis of the proposed contract of Assurance

Signature of the Person whose Life is to be Assured.

Witness

Date

The Policy, when the age is admitted, will be and indisputable except on the ground of fraud

FORM OF LIFE POLICY

No

Sum Assured £ *Premium £*

WHEREAS
(hereinafter called The Life Assured), whose age is admitted not to exceed years, has this day paid to the ASSURANCE SOCIETY the sum of as a first Premium on this Policy and the like Premium is to be paid on the same day in every future year during the whole survivorship of The Life Assured in order to keep this Policy on foot

Now these Presents witness, That on the death of The Life Assured and on due proof given of the death and of title, the Society will pay to the executors, administrators, or assigns, of The Life Assured the sum of pounds, together with any BONUS which according to the provisions of the Deed of Settlement of the Society may at the time of such death be attached to this Policy.

Provided That this Policy is granted upon the following conditions, that is to say —

(1) That payment of every Premium, which is to be paid as above mentioned, be made within Thirty Days from the day fixed for payment thereof, and if so made, this Policy shall remain in force notwithstanding the death of The Life Assured during such thirty days

(2) That, if The Life Assured commit suicide within one year from the date of this Policy, all money which would otherwise have become payable for the benefit of his estate under this Policy shall be forfeited and belong to the Society, but this condition shall not prejudice the interest in such money of any Assignee for value.

Provided also That the Society's Assurance Fund for the time being, and the Proprietors' Fund on the first day of (which then amounted to the sum of £), and so much of the Capital of the Society, held in Shares by the Proprietors and others, as on the said first day of had not been paid up or according to the provisions of the Deed of Settlement been considered as paid up (such Proprietors' Fund and Capital amounting together to the sum of *One Million Pounds Sterling*), shall alone be liable to any claim or demand in respect of this Policy; and no

Director signing this Policy, nor any other Proprietor, shall be liable to any claim or demand in respect thereof beyond the unpaid portion of the Capital held by him And as to the Proprietors' Fund, nothing herein contained is to be construed to give to any person entitled to the benefit of this Policy any charge or claim on any accumulation thereof made, or to be made, after the thirty-first day of

In with ess whereof We, Three of the Directors of the said Society, have hereunto set our hands this day of One thousand eight hundred and

Examined

Entered

NOTICE

All Notices of Assignment of the Policy must be sent *direct to Street, London*, the principal place of business of the Society No Agent of the Society is authorised, under any circumstances whatever, to receive, acknowledge, or transmit such Notice.

GUARANTEE OF SURRENDER VALUE

The within written Policy will acquire a Surrender Value so soon as three full annual Premiums have been paid, and the Society then guarantees the following sums as the Surrender Value, namely —

(1) One-third of so much of the Premiums received as would represent ordinary Premiums on the same Policy according to the true age at the date of issue thereof

(2) The full Cash Value calculated according to the published Bonus Table of the Profits (if any) attached to the Policy at the time of surrender

PROTECTION AGAINST FORFEITURE FOR NON-PAYMENT OF PREMIUMS IN CERTAIN CASES AND FOR A LIMITED TIME

When a Policy has a Surrender Value, then, notwithstanding an omission to pay any subsequent Premium or Premiums, the Policy will remain in force unless and until the Surrender Value of the Policy, as at the date when the first unpaid Premium is payable, becomes exceeded by the total of the amount due in respect of Premiums and in respect of any loan made on the Policy by the Society and of the accumulated compound interest with half-yearly rests on the amount of Premiums

and loan (if any) at the rate for the time being charged on loans made by the Society on the security of their Policies

The Premium or Premiums due, if paid with accumulated compound interest at the before-mentioned rate while the Policy remains in force under this Provision, will be accepted by the Society

Own Life *Age Proved.*

FORM OF MARINE POLICY

Be it known that *John Smith* as well in *his* own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain in part or in all, doth make assurance, and cause *him* and them and every of them, to be insured, lost or not lost, at and from *London to New York* upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the *Firefly* whereof is Master, under God, for this present voyage,

or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the said Ship or the Master thereof is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship *as above* upon the said Ship, &c. *as above*, and shall so continue and endure, during her Abode there, upon the said Ship, &c., and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at *as above* upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed, and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever

without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c, for so much as concerns the Assured, by Agreement between the Assured and Assurers in this Policy, are and shall be valued at *ship £1200, fifty bales of tobacco £500.*

To these the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thefts, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests,

Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c , or any Part thereof, and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c , or any Part thereof, without Prejudice to this Insurance, to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured
at and after the Rate of

In witness whereof, we the Assurers have subscribed our Names and Sums assured in *London the 1st day of June 1914*

N B —Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded, Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent, and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent, unless general, or the Ship be stranded

£500 { *John Jones*
William Brown
Thomas Green
William Green
Henry Black } *each one-fifth of* } *five hundred pounds*

£1000 { *Thos Jones*
Isaac Moses
Samuel Levi
Henry Smithson
Richard King } *each one-fifth of* } *one thousand pounds*

QUESTIONS

Mercantile Persons and Mercantile Property

§§ 1–17

1 Has an alien the same rights as a British subject in matters of trade in this country?

2 What are the different kinds of property recognised by law?

3 What special characteristics attach to the ownership of British ships?

4 What is copyright, how long does copyright in a book last? How can copyright be assigned?

5 How can the right to the exclusive use of a design be obtained?

6 What is a patent; how is it obtained, and for how long does it last?

7 How is the exclusive user of a trademark obtained? Is it assignable?

Partnership

§§ 18–27

1 Define a partnership. A becomes a partner on condition that he is to have no share in the profits, is such an arrangement binding?

2 Is sharing profits conclusive evidence of partnership?

3. What power has a partner to bind the firm?

4 To what extent is a partner liable for the debts of the firm?

5 What is the position of a person who holds himself out to be a partner?

6 State the chief duties of partners as between themselves.

7 Suppose the partners differ as to the management of the business, how is the matter decided?

8 What effect has the death of a partner on the partnership?
9 How is a partnership dissolved?
10 What are the effects of a dissolution?
11 Is the private property of a partner liable for the debts of a firm?
12 What is a limited partnership?
13 How far is a limited partner liable for the debts of the firm?

Companies

§§ 28–40

1 What is meant by a limited company; how is it formed?
2 Describe a "memorandum of association," stating what it contains
3 What are "articles of association"?
4 What is meant by a "share"? A applies for shares in a company, when will he be bound to take them, up to what time can he withdraw his application?
5 When will the court order a company to be wound up?
6 Distinguish stock from shares
7 What is a debenture, how does it differ from debenture stock?
8. What is a private company?

Principal and Agent

§§ 41–56

1 Distinguish a factor from a broker.
2 What is a *del credere* agent?
3 Distinguish "general" from "special" authority.
4 How may an agent be appointed?
5 What is meant by ratification? What conditions are required for a valid ratification?
6. What power has an agent to bind his principal?
7 When can an agent appoint a sub agent? What relation exists between the sub-agent and the principal?
8 Describe the chief duties of an agent.
9 What degree of diligence must an agent show in discharge of his duties?
10. What remedies has an agent for his commission?

11 What are the chief duties of the principal as regards the agent?

12 The principal directs his agent to do a wrongful act, is the agent bound to do it? Is the principal or the agent liable for the wrong done?

13 An agent contracts with a third party without disclosing the name of his principal, what is the legal position of the parties?

14 When is an agent personally liable on a contract?

15 What is the result where an agent falsely pretends to be an agent and enters into a contract?

16 What special powers are possessed by (*a*) factors, (*b*) brokers?

17. What are the powers of an auctioneer?

18 The principal revokes the authority of an agent, who after such revocation enters into a contract on behalf of the principal, is the contract binding on the principal?

19 In what way is the relation of principal and agent terminated?

The Formation of Contracts

§§ 57-68

1. What is a contract; when does an agreement amount to a contract?

2. "Every agreement can be analysed into an offer and an acceptance" Explain this statement

A firm of auctioneers advertise that they will sell furniture by auction on a certain day B goes to the auction-rooms at the time advertised, and is informed that the auction will not take place, has he any claim for his expenses against the auctioneer?

3 A makes an offer by post, and B accepts by telegram, when is the acceptance complete?

4 A gets into a tramcar, travels a certain distance, pays his fare, and then gets out Show that there was a contract between the tramcar company and A, pointing out the offer and the acceptance.

5. State the chief rules relating to the revocation of offers

6 A advertises that he will give £100 to any person who, suffering from a cold, uses an article sold by A. and is not cured B, who is suffering from cold, buys the article and is not cured, can he recover the £100?

7 At what moment of time is the revocation of an offer complete?

The Capacity of Parties to Contract

§§ 69-89

1 To what extent can an infant enter into contracts binding on him?

2 A., being under 21 years of age, purchases a horse for £150, on credit, when he comes of age he writes a letter to the vendor admitting that the £150 is due for the horse; can the vendor sue him and recover the £150?

3. Can a money-lender recover money lent to a person under 21 years of age?

4. What is meant by "necessaries"? Are books necessaries? How is the question as to what are necessaries determined?

5 Distinguish "void" from "voidable" contracts: what contract of an infant falls under each class?

6 When can a married woman enter into a contract binding on her?

7. What is separate property? A married woman owning property incurs a large debt at her dressmaker's, can she be sued for the debt?

8 A married woman is sued for a debt; it turns out she had no separate property at the time she contracted the debt, but acquired separate property afterwards, is such property liable to pay the debt?

9. What power has a married woman to contract as agent of her husband?

10 How does a corporation enter into a contract?

11. When may a corporation contract without using its seal?

12 Is a contract entered into by a lunatic binding on him?

13 A contracts with B, a lunatic, not knowing that he is insane, what is the position of the parties?

14 A., whilst drunk, enters into a contract with B, is such contract binding?

The Form of and Consideration for Contracts

§§ 90-105

1 How many classes of contracts are recognised by English law?

2. What are the requisites of a contract under seal?

3 What is a deed, from what time does it date? Distinguish a deed from an escrow

4 What contracts require a deed?

5 When ought a trading corporation to contract under seal?

6 Define a simple contract

7 What simple contracts are required to be in writing?

8 A. engages a servant at the rate of £20 a year, wages to be paid monthly, ought the contract to be in writing?

9 When ought contracts for the sale of goods, to be in writing?

10 What is a consideration?

11 Distinguish an executed from an executory consideration

12 A., being in want of money, sells B a picture that is worth £500 for £100, can A afterwards set aside the sale on the ground that B did not give him the full value of the picture?

13 A owes B. £100, and B threatens legal proceedings, A writes B asking for a month's time to pay, B replies saying he will wait for a month Is B legally bound to wait the month?

14 What is a past consideration, will it support a simple contract?

Legality and Possibility of Performance

§§ 106–119

1 A lends B money for an illegal purpose, can he recover it?

2 Can A insure B's life?

3 Can a father insure his son's life?

4 What restrictions exist as to trading on Sunday? Is a contract made on a Sunday binding?

5 What special rules exist regarding the sale of game, coal, and bread?

6 What is meant by an agreement in restraint of trade? To what extent is such an agreement lawful?

7 A sells his business and the goodwill thereof to B, can A. set up a similar business in the same street?

8 What conditions must be fulfilled in order that the court may uphold an agreement in restraint of trade?

9 A threatens to make B a bankrupt, B offers A £10 not to do so, and A accepts the offer, is the agreement binding?

10 Enumerate and describe the different kinds of "impossibility of performance"

11. When will impossibility of performance avoid a contract?

12 A, a married man, proposes marriage to B, who knows he is married; B afterwards brings an action for breach of promise against A.; is A. liable for damages?

13 A. sells B shares that he (A) does not possess, and fails to deliver them to B, has B any remedy?

Mistake, Misrepresentation, and Fraud

§§ 120–130

1 What is meant by unreality of consent?

2 When will mistake avoid a contract?

3 A buys from B a piece of old china which he (A) believes to be Dresden, but which B knows is not Dresden, is the sale binding?

4. A. sells B a piece of china, both believe it to be Dresden, but it is not, is the sale binding?

5 What amounts to a misrepresentation? Distinguish misrepresentation from fraud

6 When will misrepresentation be a ground for avoiding a contract?

7 A reads the prospectus of a company and applies for shares, which are allotted to him Afterwards, he finds that some of the statements in the prospectus are untrue can he rescind the contract to take shares? What other remedy has he?

8 What remedies are open to a person who has been induced to enter into a contract (*a*) by misrepresentation, (*b*) by fraud?

Assignment of Contracts

§§ 131–134

1 Can the liability under a contract be assigned?

2 A owes B £10, can B assign the right to receive the money to C? If so, how must the assignment be made?

3 A has bought 1000 pieces of cloth, can he assign to C the right to receive the cloth?

4 How is a bill of exchange assigned?

5 Illustrate the assignment of rights and liabilities by operation of law

Performance, Breach, and Discharge

§§ 135–144

1 In what form must tender of money be made in order to amount to "legal tender"?

2 A owes B £20, and B gives him a bill of exchange for £20, is the debt discharged?

3 When can a party to a contract refuse performance where there has been a breach on the other side?

4 A. commits a breach of a contract made with B, what are B's remedies?

5 How can a contract be discharged?

6 A. enters into a written contract with B., they desire to rescind it How can this be effected?

The Sale of Goods

§§ 145–172

1 Distinguish a sale from an agreement to sell

2 Distinguish sale from "gift" and from "barter"

3 What is meant by price? Suppose the parties do not agree on the price, is there a valid sale?

4 What form is required for a contract for the sale of goods under £10?

5 State the form requisite for a sale of goods over £10 in value

6 What is meant by "acceptance and receipt"? A. orders a package of sponges from B at 11s per lb On the arrival of the package A. examines the sponges, and, finding them worth only 6s a lb, returns them to B Was there an acceptance and receipt of the goods sufficient to satisfy the 4th section of the Sale of Goods Act?

7. Distinguish "earnest" from "part payment."

8 Under what circumstances can a contract in writing be gathered from a series of letters?

9 Where a contract of sale of goods over £10 in value is reduced to writing, what ought the memorandum to contain?

10 Can a written offer be accepted orally? Will such acceptance

satisfy the 4th section of the Sale of Goods Act where the goods sold are over £10 in value?

11. State the chief rules relating to the signature of contracts so as to satisfy the 4th section of the Sale of Goods Act

12 How are the provisions of the 4th section of the Sale of Goods Act fulfilled in the case of a public auction?

13 Explain the nature of a "bought" and a "sold" note

14. What are the powers and functions of a "broker"?

15 Explain the rule *caveat emptor*

16. What is a warranty? Distinguish a warranty from a condition.

17. What warranties and conditions are implied in every sale of goods?

18 What warranties and conditions are implied in a sale by sample?

19. A orders goods from B of his own manufacture, B supplies similar goods made by C; is A. bound to accept them?

20 What are the chief duties of a seller of goods?

21 Is a seller of goods bound to send them to the purchaser?

22 What is meant by lien? What lien has a seller over the goods sold?

23 What is stoppage *in transitu*? When and how is it exercised?

24 When can a seller resell goods not paid for by the buyer?

25 Mention some acts that amount to acceptance of goods by the buyer

26 How should the price be tendered so as to be a "legal tender"?

27 A. owes B £5 6.8 for goods bought, he tenders a £10 note, which B refuses; is the tender good?

28 A. buys £100 worth of goods from B, and gives B a bill of exchange The bill is not paid when due Can B sue A. on the original contract, apart from the bill?

29 Can an agent of the seller receive payment? A. owes B £10 for goods bought He meets a clerk from A's shop in the street, and pays him the £10 The clerk runs away and B demands payment. Can A. successfully resist the demand?

30 A. writes B to ask him to remit the amount of a debt by cheque by post. B. posts a cheque for the amount, but the letter never reaches A. The bank on which the cheque was drawn suspends payment. A. writes B saying he has not received the cheque. B replies he sent it as requested Can B be compelled to pay A.?

31 A. enters B's shop and selects a box of cigars C seizes the cigars and runs away with them Who has to bear the loss, A. or B.?

32. A. orders 20 lbs. of sugar from B at 2d a lb of a certain quality, when will the ownership of the 20 lbs pass to A.?

33 When does the ownership pass to the buyer when goods are sent on approval?

34 When will the ownership of unascertained goods pass to the buyer? What is meant by unascertained goods?

35 Can a seller reserve the right to dispose of goods after he has made delivery?

36 A thief sells B goods stolen from A., can A. claim the goods from B ?

37. What is the effect of a sale in market overt? What is market overt?

38 Can an unpaid seller claim interest on the price from the buyer?

39 What is the remedy of a buyer where the seller refuses to deliver goods bought from him?

40 When can a buyer refuse to take delivery of goods?

INSURANCE

§§ 173-200

1 What is insurance?

2 What is meant by saying that fire and marine insurance are based on the principle of indemnity?

3 What conditions must be observed by any one who is making a proposal for insurance?

4 What is an insurable interest?

5 A person insured omits to pay the premium when it is due, but pays it during the days of grace, what is the effect on the policy?

6 What is meant by underwriting?

7 Distinguish a valued from an open policy

8 Distinguish a voyage from a time policy

9 What is the slip? Has it any legal effect?

10 What is a warranty? What warranties are implied in a marine policy?

11. What amounts to seaworthiness?

12 Explain the terms "average," "free from average," and "general average."

13 What amounts to a total loss? A vessel is wrecked, what steps should the owner take so as to be able to claim for a total loss?

14 How is a partial loss calculated?
15 When can A insure B's life?
16 The proposer for a life insurance makes an untrue statement in the proposal, what effect has this on the policy?
17 Can a policy of life insurance be assigned?
18 What is meant by fire in a fire policy?
19 What conditions, if they occur, will usually avoid a fire policy?
20 What steps ought to be taken when a loss occurs by fire?
21 Suppose the articles are insured in different offices, can the insured recover from each?

GUARANTEES

§§ 202–208

1. Describe the nature and objects of a guarantee.
2 In what form must a guarantee be made?
3 State the position of the party guaranteeing, can he be sued before the principal?
4 What is a continuing guarantee?
5 What is the position of a surety who pays the whole debt as regards the principal debtor?
6 A B and C are sureties for D, D fails to pay, and A. is sued Is A. liable for the whole debt? Suppose he pays the whole, what right has he against B and C?
7 A B and C are sureties, A. is sued for the whole debt, can he, before paying anything, call on B and C to contribute their shares?
8 When can a surety withdraw from a guarantee?
9 What conduct on the part of the creditor will discharge the surety?
10 A. is surety for B paying a debt to C on the 1st January C extends the time to the 1st February, but before the 1st February B becomes bankrupt, is A. liable to C.?

CHARTER-PARTIES AND BILLS OF LADING

§§ 210–250

1 What is a charter-party?
2 What warranties are implied in a charter-party?

3 What is freight? When is it earned?

4 Mention some of the chief provisions found in charter parties

5 What is meant by seaworthiness? Is there any implied warranty of seaworthiness in a bill of lading?

6 What is register tonnage?

7 What are lay-days?

8 What are the duties of the charterer as regards loading a full and complete cargo? What is dead freight?

9 What perils are usually excepted in a charter-party?

10 What is demurrage?

11 What is a bill of lading? How is it transferred?

12 What is the duty of the captain as regards deviation?

13 To whom are goods comprised in a bill of lading to be delivered?

14 What perils are usually excepted in a bill of lading?

15 What is meant by "act of God"?

16 What perils are covered by the phrase "perils of the sea"?

17 What is barratry?

18 What is general average? Who must contribute to it?

19 What is salvage?

20 What is the nature and object of a bottomry bond and of a respondentia bond?

21 What powers has the master as regards the shipowner?

22 To what extent is the master the agent of the cargo-owner?

Bills of Exchange

§§ 251–271

1 What is a bill of exchange? Write out an example

2 Distinguish an inland from a foreign bill

3 What are the requisites of a bill of exchange?

4 What is presentation for payment? When is it necessary?

5 What are days of grace?

6 Where is a bill payable? If an acceptor desires to pay at a given place, how should he accept?

7 Who is the acceptor? What is his legal position?

8 How can a bill be transferred?

9 Who is the drawer? What is his legal position?

10 Who is an endorser? When is he liable to a subsequent holder?

11. What course ought the holder of a bill to take if the bill be dishonoured?

12 Distinguish a cheque from a bill of exchange.

13 What is the effect of crossing a cheque?

14 What is the effect of writing "not negotiable" across a crossed cheque?

15 Has the holder of a dishonoured cheque any remedy against the bank?

16. What advantage does the holder of a cheque derive by presenting the cheque within a reasonable time after he receives it? What is a reasonable time?

17. What is a promissory note? Is presentation necessary?

18 What is an I O.U.? Can it be transferred?

BANKRUPTCY

§§ 272-295

1 What is meant by an act of bankruptcy?

2. Enumerate the chief kinds of acts of bankruptcy.

3 When can a creditor present a petition in bankruptcy?

4 What is an order of adjudication? What is its effect?

5 Can a married woman be made bankrupt?

6. What are the chief duties of the official receiver?

7. What is the object of the first general meeting?

8 What is a scheme of arrangement? How must it be passed to be binding?

9 How is the trustee appointed? What are his chief duties and powers?

10 What is the committee of inspection? How is it appointed?

11. How are debts proved in bankruptcy?

12. What is a secured debt? What is the position of a creditor whose debt is secured?

13 What property belonging to the bankrupt is not available for paying his debts?

14 What property belonging to others is liable for a bankrupt's debts?

15 When are goods said to be in the order or disposition of a bankrupt?

16 A bankrupt made a settlement of part of his property before his bankruptcy, is such settlement perfectly valid?

17. What is onerous property? What powers has the trustee over such property?

18 How does a bankrupt get his discharge?

19 What are the effects of a discharge?

20 When will a discharge be withheld or suspended?

21 What disabilities is a bankrupt under?

22 When will an adjudication be annulled?

23 What conditions must be fulfilled before a scheme of arrangement is binding?

24 What is the effect of a private arrangement with creditors?

Action and Arbitration

§§ 296–300

1 What are the remedies for a breach of contract?

2 When are nominal damages recoverable?

3 Can a person who has suffered damage by breach of contract recover as damages all the loss he has suffered?

4 How are disputes referred to arbitration?

5 What are the powers of an arbitrator?

The Application of Law

§§ 301–310

1 By what law is the ownership of land governed? A is a Scotchman residing in England, and owning land in Scotland He dies without a will What law will govern the descent of the land?

2 What is domicile?

3 An Englishman, domiciled in England, owns shares in an Australian bank, he wishes to leave them by will ought the will to be in accordance with English or Australian law?

4 By what law is the validity of a contract governed?

5 A bill of exchange is drawn in France according to French law, and is payable in England, is the bill valid according to English law?

6 How can a foreign judgment be enforced in England?

NOTE TO § 32

Where articles of association restrict the interests of foreigners in the company and it is desired to alter them, the consent of the Board of Trade has now to be obtained, under the provisions of the statute 7 & 8 Geo V c 18

NOTE TO § 69

The capacity of parties to contract has been further affected by the Registration of Business Names Act, 1916 This statute provides that—

(*a*) Every firm having a place of business in the United Kingdom and carrying on business under a business name which does not consist of the true surnames of all partners who are individuals, and the corporate names of all partners who are corporations,

(*b*) Every individual having a place of business in the United Kingdom and carrying on business under a business name which does not consist of his true surname,

(*c*) Every individual or firm having a place of business in the United Kingdom, who, or a member of which, has either before or after the passing of the Act changed his name, except in the case of a woman in consequence of marriage,

shall be registered in the manner directed by the Act

Similar provision for registration is made in the case where business is carried on wholly or mainly as nominee or trustee of or for another person or persons or another corporation, or includes the general agency for any foreign firm

Exceptions are provided in the case of—

(1) An addition that merely indicates that the business is carried on in succession to a former owner,

(2) The mere addition of an *s* to a surname indicating two or more partners of the same name;

(3) The carrying on of a business by a trustee in bankruptcy or a receiver or manager appointed by any Court

The Act further provides that, where persons have made default in registering at the local register office a number of particulars that are laid down by the Act, they shall not be able to enforce by legal proceedings any contractual rights in relation to the business in respect of which they are in default under the Act Such a contract is not void but is unenforceable by the defaulter, for the rights of other parties against him in respect of such a contract are not affected When, however, such other parties have elected to enforce their rights by legal proceedings, the defaulter is not precluded from setting up by way of counter-claim or otherwise any rights that such a contract may afford him And it seems from recent decisions that the Act prohibits the enforcement of contracts within its scope only as between the immediate parties thereto

NOTE TO § 107

We have seen (§ 107) that an agreement made for an unlawful purpose is void Trading with the enemy in time of war is a misdemeanour at Common Law All trading with the enemy (except what is specially permitted for reasons of public policy) is highly criminal, as it tends to defeat one of our main objects in war, namely, the crippling of the enemy's trade In the very early days of the present war an Act of Parliament was passed providing special punishments for the offence of trading with the enemy, and enabling the King by Proclamation to define what acts amount to trading with the enemy Accordingly, all contracts made for the purpose of trading with the enemy are illegal and void and cannot be enforced by our Courts Moreover, contracts which are perfectly legal when entered into become illegal on the outbreak of war, if their performance involves trading with the enemy Such contracts are generally dissolved by the outbreak of war and cannot be enforced by either party

The persons with whom it is unlawful to trade and to whom money may not lawfully be paid during war are all persons who reside and carry on business in the enemy country, whatever their nationality, but there is nothing illegal in continuing to do business with persons of enemy nationality who are residing and carrying on business in neutral countries, or even with those who are

interned or registered here and are carrying on business here with the permission of the King A company registered here as an English company, and having its office here, is regarded as an enemy, if in fact the bulk of the shares are held by persons residing in an enemy country, so that the real control and direction of the affairs of the company are in enemy hands

Alien enemies, that is those who are residing or carrying on business in an enemy country, are under this further disability, that they cannot, during the continuance of the war, sue in this country as plaintiffs, even to enforce rights accrued before the outbreak of war But they may be sued, and if sued, may appear by counsel to defend themselves in our Courts

NOTE TO § 230

It is stated in the text that when a shipowner has unjustifiably deviated he cannot rely on the excepted perils, and is liable for all loss of, or damage to, the goods except such as is caused by the Act of God, or the King's enemies, or the inherent unfitness of the goods to be carried It appears, however, from recent cases that in such cases the shipowner is liable even for loss caused by the Act of God, the King's enemies, or inherent unfitness of the goods to be carried, unless he can show that loss from one of those causes would have happened in any event even though he had not deviated

That is, of course, very difficult to show Thus when, during the present war, a ship coming up channel called at Havre (which was not a permitted deviation), and was torpedoed by an enemy submarine, the shipowners were held liable for the loss of the cargo The loss was due to the King's enemies, but it could not be proved that the loss would have happened if the ship had kept her direct course up channel It must be remembered that an unjustifiable deviation puts an end to the liability of the underwriters of a policy of insurance on the cargo, and as the cargo owner loses this security, it is only fair that the shipowner should be liable for the loss

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THE END

Printed by R. & R. Clark, Limited, *Edinburgh*

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Globe 8vo

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